TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 78

BAKER DUNCAN, PETITIONER,

vs.

GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY

WRIT OF CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED MAY 10, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

BARKER DUNCAN, PETITIONER,

vs.

GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI

INDEX.

	Original	Print
Proceedings in Springfield Court of Appeals	1	1
Caption (omitted in printing)	1	
Praecipe for transcript of record	2	1
Record from Circuit Court of Texas County	3	2
Caption (omitted in printing)	3	
Minute entry of trial	3	2
Verdict and judgment	4	2
Order allowing appeal	6	3
Clerk's certificate (omitted in printing)	6	
Appellant's abstract of the record	8	4
Caption	8	4
Petition	9	4
Amended answer	16	9
Verdict	21	11
Appeal granted	21	11
Bill of exceptions	21	12
Testimony of Joe Smith	21	12
Exhibits "A" & "B"—Photographs (omitted in printing)	22	
Exhibit "C"—Photograph (omitted in printing)	28	
Exhibit 1—Photograph (omitted in printing)	30	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1941.

	Original	Print
Proceedings in Springfield Court of Appeals—Continued		
Record from Circuit Court of Texas County—Continued		
Appellant's abstract of the record—Continued		
Bill of exceptions—Continued		
Testimony of Barker Duncan	32	13
Exhibit "D" Agreement with Barker Duncan	39	18
Exhibit "E" Copy of draft, August 13, 1937, $600	42	20
Plaintiff rests	43	21
Defendant's requested instructions, refused	43	21
Testimony of Ed Wilhelmson	46	22
J. G. De Good	46	23
Clark Everett	51	27
Grant Hicks	54	29
B. F. Hull	56	30
O. L. Salter	59	31
Defendant's requested instruction refused	65	37
Plaintiffs requested instructions, given	66	38
Defendant's requested instructions, given	74	42
Court's instruction to jury	82	47
Defendant's requested instructions, refused	82	47
Verdict	89	52
Judgment	90	52
Motion for new trial	90	52
Motion for new trial overruled	93	54
Affidavit for appeal	94	55
Record entry re motion for new trial	96	56
Order settl'ng bill of exceptions	96	56
Clerk's certificate (omitted in printing)	97	
Reporter's certificate (omitted in printing)	98	
Respondents supplemental abstract	104	57
Testimony of Joe Smith	104	57
Barker Duncan	106	59
Admission as to certain facts	128	74
Testimony of Edward Wilhelmson	129	74
Grant Hicks	130	75
B. F. Hull	131	76
O. L. Salter	133	77
Motion to dismiss appeal	137	78
Suggestions in support of motion	143	81
Argument in support of motion	146	83
Minute entry of argument and submission	153	87
Judgment	154	87
Opinion, Tatlow, J.	155	88
Motion for rehearing	177	106
Motion to modify opinion	185	115
Order overruling motion for rehearing, etc.	193	124
Opinion on motion for rehearing, Tatlow, J.	194	124
Recital as to application for writ of certiorari to Supreme Court of Missouri	206	136

	Original	Print
Proceedings in Springfield Court of Appeals Continued		
Application for stay of mandate	207	136
Order of Supreme Court denying petition for writ of certiorari	210	137
Order staying mandate	211	138
Clerk's certificate (omitted in printing)	212	
Proceedings in Supreme Court of Missouri	214	138
Caption (omitted in printing)	213	
Notice of petition for writ of certiorari	214	138
Petition for writ of certiorari	216	139
Exhibit "A"—Opinion of Court of Appeals (copy) (omitted in printing)	226	
Exhibit "B"—Opinion of Court of Appeals on motion for rehearing (copy) (omitted in printing)	241	
Exhibit "C"—Motion for rehearing in Court of Appeals, etc. (copy) (omitted in printing)	253	
Exhibit "D"—Order of Court of Appeals overruling motion for rehearing (copy) (omitted in printing)	269	
Suggestions in support of petition	270	142
Order denying petition for writ of certiorari	273	145
Clerk's certificate (omitted in printing)	273	
Stipulation as to printing record	274	145
Order extending time within which to file petition for certiorari	275	146
Order extending time within which to file petition for certiorari	276	147
Order allowing certiorari	277	147

[fol. 1] [Caption omitted]

[fol. 2] IN SPRINGFIELD COURT OF APPEALS, STATE OF MISSOURI

PRAECIPE FOR TRANSCRIPT OF RECORD

1. The printed copy of the record in the Springfield Court of Appeals, together with the index.

2. Printed copy of respondent's supplemental record, together with the index.

3. Respondent's motion to dismiss appeal.

4. Opinion of the Springfield Court of Appeals.

5. Respondent's motion for rehearing and the motion to modify opinion.

6. Court's additional opinion on motion for rehearing.

7. Short form transcript of appeal.

8. All record entries in the Springfield Court of Appeals, to-wit:

(a) Orders filing and overruling respondent's motion to dismiss appeal.

(b) Orders filing and overruling respondent's motion for rehearing and motion to modify opinion.

(c) Judgment of the Springfield Court of Appeals.

(d) Date of notice given Writ of Certiorari to be filed in Supreme Court of Missouri.

(e) Order filing and sustaining motion for stay of mandate.

Harry G. Waltner J., Jefferson City, Mo. John P. Moberly, Houston, Missouri. Sizer & Myres, Monett, Missouri. Wm. J. B. Myres, Attorneys for Respondent.

McReynolds & Flanigan, Carthage, Missouri. Attorneys for Appellant.

[fol. 3] [Caption omitted]

In Circuit Court of Texas County

#3960

Damages

Barker Duncan, Plaintiff

vs.

Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, a Corporation, Defendant

Minute Entry of Trial—March 7, 1940

[fol. 4] Now on this the 7th day of March, it being the fourth judicial day of the March Term of Court, 1940, this cause, No. 3960 coming on for trial, and comes the Plaintiff, Barker Duncan, in his own proper person, together with his Attorneys, Wm. J. B. Myres and John P. Moberly, and comes the defendant, Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, and its Attorneys, Judge D. E. Blair and W. L. Hiett, and both sides announcing ready, the following jurors were duly impaneled and sworn to try the issues herein: J. W. Beeler, Lloyd Helton, J. C. Bennett, Robert Butts, W. Mullins, J. E. Bridges, Perry Courtney, Ray Peabody, C. R. Beasley, Fred Shelton, Williams Bley, and C. D. Keller.

Whereupon, the plaintiff and the defendant made their opening statements to the jury, and the taking of testimony on the part of the plaintiff was begun and continued until adjournment. Being unable to finish the taking of testimony, said cause was recessed until tomorrow morning.

In Circuit Court of Texas County

#3960

Damages

Barker Duncan, Plaintiff,

vs.

Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, a Corporation, Defendant

Verdict and Judgment—March 8, 1940

Now, on this 8th day of March, 1940, it being the fifth day of the March Term of Court, this cause coming on to

be heard, and comes now the following jurors, good and lawful citizens of Texas County, Missouri, to-wit: J. W. Beeler, Lloyd Helton, J. C. Bennett, Robert Butts, W. Mul- [fol. 5] lins, J. E. Bridges, Perry Courtney, Ray Peabody, C. R. Beasley, Fred Shelton, William Bley, and C. D. Keller. And after Plaintiff had finished his testimony, the Defendant proceeded to put in his testimony, and after the completion of all the evidence, and after the Court had read the instructions to the Jury, and after the Attorneys for Plaintiff and Defendant had argued the case, said Jurors retired to their Jury room to consider of their verdict; that after due deliberation, the said Jury returned into open Court the following verdict: "We, the Jury, find the issues for the Plaintiff and we assess his recovery at $5691.00, and we further find that on such judgment the Defendant is entitled to the sum of $600.00 principal and $91.00 interest, and subtracting said $691.00 from the said $5691.00, due Plaintiff, the total due Plaintiff is $5000.00.

C. D. Keller, Foreman.

It is therefore ordered and decreed by the Court that the Plaintiff have and recover of and from the Defendant Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, a Corporation, the sum of Five Thousand ($5,000.00) Dollars, in accordance with the verdict of the Jury, together with costs herein taxed at ($225) and (20) cents, for all of which execution may issue.

[fols. 6-7] In Circuit Court of Texas County

[Title omitted]

Order Allowing Appeal—March 11, 1940

Now on this day comes the Defendant by Attorney and presents to the Court his application and files his affidavit for an appeal in said cause, and the same being taken up, considered and found to be sufficient, it is ordered, by the Court, that an appeal be allowed to the Springfield Court of Appeals, and his appeal bond is fixed, by the Court, in the sum of Ten Thousand ($10,000) Dollars, and Ten ($10) Dollars docket fee is paid to Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 8] IN THE SPRINGFIELD COURT OF APPEALS

October Term, 1940

BARKER DUNCAN, Respondent,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of Texas County, Missouri.

Honorable William E. Barton, Judge.

Appellant's Abstract of the Record—Filed September 5, 1940

This action was commenced in the Circuit Court of Newton County, Missouri, on April 4, 1938, by the filing of a petition, which, omitting names of attorneys, caption and venue, and including amendment by interlineation, made in the Circuit Court of Texas County, of which no complaint is now made, was as follows:

[fol. 9] PETITION—DAMAGES

Comes now the plaintiff, and for his cause of action states:

That the Missouri Pacific Railroad Company is now, and was at all the times hereinafter mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, having capacity to sue and liable to be sued as such; that the defendant, Guy A. Thompson, is, and was at all the times hereinafter mentioned, the duly appointed, qualified, and acting trustee of the Missouri Pacific Railroad Company, and as such trustee, was, at all the times hereinafter mentioned, controlling, operating, and running all of the rolling stock, roundhouses, turntables, depots, station grounds, yards, and tracks of the Missouri Pacific Railroad Company, and is, and was, at all the times hereinafter mentioned, acting as such trustee under the order of the Federal Court, pending the reorganization of said Railroad Company; that the defendant operates a line of railroad extending from St. Louis, Mis-

souri, in a westerly direction to and through the towns of Jefferson City, and Sedalia, and thence in a southerly direction to and through the towns of Nevada, Lamar, and Carthage; that from Carthage defendant's line of railroad extends in a southeasterly direction into the State of Arkansas; that one of defendant's line of railroad runs from Carthage and Joplin to Granby, Missouri, in Newton County, [fol. 10] where defendant keeps and maintains a station and station agent where service may be had upon the defendant, as provided by law.

Plaintiff states that in Nevada, Missouri, the defendant maintains large and extensive yards, roundhouses, and repair shops, wherein his locomotives are repaired and serviced; that as a part of the repair and service department of defendant's railroad, defendant maintains a large roundhouse and turn-table in connection therewith, at Nevada, Missouri, where engines are serviced and repaired while making their runs through Nevada, Missouri.

Plaintiff states that on and prior to the 10th day of April, 1936, he was in the employ of defendant as a shop laborer, in defendant's roundhouse and turn-table at Nevada, Missouri; that plaintiff's duties required him to assist in repairing and servicing and keeping in order the defendant's locomotives and other equipment in defendant's roundhouse at Nevada, Missouri; that his duties required him to service and assist in servicing defendant's interstate and intrastate engines during their run and at the end of their runs. Plaintiff states that as such employee, he does not know whether he was, at the times herein mentioned, engaged along with the defendant in interstate or intrastate commerce, but states that it was the one or the other, but he verily believes that it was in interstate rather than intrastate, and if in interstate, the relationship between plaintiff and defendant was, and is governed by the Fed [fol. 11] eral Employers' Liability Act, passed and approved by the general Congress of the United States, together with all the amendments thereof; that if in intrastate, his cause of action is governed by the State compensation laws of Missouri.

Plaintiff states that if as such interstate employee, the defendant owed him the duty to exercise ordinary care toward him, and to furnish him with a reasonably safe place to work, and to furnish him with tools and appliances

so as to make the performances of his duties reasonably safe, and to furnish employees who would not negligently injure plaintiff; that the defendant owed the duty to plaintiff to exercise ordinary care to adopt a method of performing its works in servicing the engines reasonably safe method; that defendant's foreman over the plaintiff owed the duty to exercise ordinary care in directing and ordering plaintiff about his work; that defendant owed the duty to warn plaintiff and other employees working on engines on the turn-table at the roundhouse at Nevada, when such turn-table was going to be moved.

Plaintiff states that defendant, his agents, servants, and employees failed to perform the duties which they owed to plaintiff, and that on account of such negligence, plaintiff was on said date, injured in the following manner and particulars, to-wit:

Plaintiff states that at about the hour of 1:30 a. m. of April 10, 1936, he was working at the roundhouse of de- [fol. 12] fendant in Nevada, Missouri; that engine No. 1429 had just been brought in on the turn-table just outside of the roundhouse at Nevada, Missouri; that said engine was on a run from Joplin to Nevada, and was being serviced to complete its run back to Joplin, Missouri; that while said engine was situated on the turn-table, defendant's roundhouse foreman directed plaintiff to fill the lubricator on said locomotive engine; that the lubricator on said engine was located under the running board on the right side of the engine. Plaintiff states that while said locomotive was situated, as aforesaid, he proceeded to take his position to fill the lubricator in the usual and customary way, in the absence of a ladder, by standing with one foot on the rail of the turn-table, and the other foot on the cylinder chest of the engine; that while so situated in the act of filling the lubricator, the foreman looked at plaintiff, and indicated by words and actions not to do his work in that manner, but to do it the only other way, by getting on the running board, which required plaintiff to get upon a narrow running board and stoop over to fill the lubricator, in the absence of a ladder, and in the absence of grab irons or other safety appliances to hold to while filling the lubricator; that it was dark and there were no lights or illumination provided about or over the turntable, on that side of the engine, as it was situated on the

turn-table, and the place where plaintiff was thus required to work was not a reasonably safe place.

[fol. 13] Plaintiff states that while he was on the running board of the engine, and was leaning over in the act of removing the spout of the oil can from the lubricator, suddenly, and without warning, contrary to a long established custom to warn men on the engine when it was to be moved, defendant, his agents, servants, and employees negligently and carelessly caused the turn-table and locomotive engine to be jerked and moved, so that by reason of the sudden jerk and movement of the engine and turn-table, plaintiff's foot was caused to slip off the running board of the engine, and plaintiff was thrown therefrom, and hurled into the concrete turn-table pit, with such great force and violence that he was permanently injured, as hereinafter set out.

Plaintiff states that his right foot, ankle, and ankle joints and the bones thereof, were fractured, lacerated, cut, bruised, and torn; that the muscles, ligaments, tendons, nerves, fibers, and tissues of his right foot, ankle, and leg were torn, injured, bruised, sprained, lacerated, and ruptured; that both hands struck on the concrete with such force that the nerves and fibers were injured and impaired, so that they fail to properly function; that he fell onto the concrete bottom of the turn-table pit in a twisted position, so that his back and spine were twisted, sprained, and injured. Plaintiff states that his entire nervous system was shocked and impaired; that he has suffered excruci-

[fol. 14] ating pain of mind and body, and still suffers excruciating pain of mind and body; that he will in the future suffer great pain and anguish of mind and body, as a direct result of his injuries, as they are permanent in their nature, character, and extent; that he is unable to sleep well at night, and is unable to place the weight of his body on his right foot and leg, and is unable to do manual labor.

Plaintiff states that his injuries are permanent in their nature, character, and extent; that he was confined to the hospital for many months, where he underwent various operations on his foot, and the bones were cut and chiseled, and manipulated, but could never be repaired; that he will, in the future, be compelled to spend large sums of money for medicine and medical attention, as his injuries are permanent in their nature, character, and extent.

Plaintiff states that at the time he was injured, he was earning large sums of money per month and per annum and was in line for promotion and higher wages, and has lost all his earnings to the present time; that he was a strong, and able-bodied man, of the age of forty nine years, with a long expectancy; that he had had many years of railroad service with this and other railroads, and would in time be eligible for a pension. Plaintiff states that his injuries are permanent in their nature, character, and extent, and he will, in the future, lose all of his earnings and wages as his earning capacity and [fol. 15] ability to work and labor has been greatly diminished, if not totally destroyed.

Plaintiff states that he was injured, as aforesaid, by reason of the negligence of the defendant, his agents, servants, and employees, in the following manner and particulars, to-wit:

(a) In that the defendant negligently and carelessly failed to furnish a reasonably safe place for plaintiff to fill the lubricator of said engine.

(b) In that the defendant, his agents, servants, and employees negligently and carelessly ordered and directed plaintiff to perform his work in filling the engine lubricator in a manner and method which was not reasonably safe.

(c) In that the defendant, his agents, servants, and employees negligently and carelessly, without warning, contrary to a long established custom to warn men on the engine when it was to be moved, moved the turn table and engine upon which plaintiff was working, and caused plaintiff to be thrown from the engine to the bottom of the turn-table pit.

(d) In that the defendant negligently and carelessly failed to furnish a reasonably safe place, in that plaintiff's place of work was improperly lighted, and the running board was too narrow and insecure to stand upon, and failed to furnish a ladder for plaintiff to stand upon while filling the lubricator.

[fol. 16] (e) In that the defendant violated the Federal Safety Appliance Act, and failed to have grab irons on said locomotive properly located where plaintiff could hold and grab onto them in the performance of his duties, and in

furnishing a running-board too narrow and improperly placed, as prescribed by the rules of the interstate commerce.

Plaintiff states that by reason of the said negligence of the defendant, his agents, servants, and employees, in whole or in part, acting separately or conjointly, he was injured, as aforesaid, to his damage in the sum of Thirty Seven Thousand Five Hundred ($37,500) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of Thirty Seven Thousand Five Hundred ($37,500) Dollars, and for his costs laid out and expended herein.

After a change of venue, from the Judge of the Circuit Court of Newton County, Missouri, was granted defendant, the action was sent to the Circuit Court of Texas County, Missouri, where, on November 13, 1939, appellant, defendant below, filed the following amended answer (omitting caption):

Amended Answer

Now comes Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, defendant in the above entitled [fol. 17] case and admits that he is now and at all of the times mentioned in the petition was the duly appointed and acting trustee of the Missouri Pacific Railroad Company and that said company is and was at all of said times a corporation duly organized and existing under the laws of the State of Missouri and, for amended answer to the petition of plaintiff herein, denies each and every other allegation in said petition contained.

Further answering said petition, defendant states and alleges that, if plaintiff was injured at the time and place mentioned in said petition, the said alleged injuries to plaintiff were the result of the usual and ordinary risks and hazards of the business in which the plaintiff was then and there engaged at said time and place, which risks and hazards plaintiff assumed as part of his alleged employment by defendant, and said injuries were not caused by or contributed to in whole or in part by any negligence on the part of defendant, his agents, servants or employees.

Further answering said petition, defendant states and alleges that, if plaintiff was injured at the time and place

mentioned in said petition, said injury or injuries to plaintiff were wholly due to and caused by negligence of the plaintiff himself, in that plaintiff, without any instructions or directions from defendant, his agents, servants or employees, voluntarily and of his own free will, climbed and went upon an engine or locomotive of defendant over [fol. 18] steps built and constructed on said engine and went upon a run-way on said engine and negligently leaned over the side of said engine to put oil in the lubricator or oil box of said engine from and in a stooping and leaning position and, by reason thereof, lost his balance and fell from said engine, while said engine was stationary and not being moved at that time by defendant, his agents, servants or employees, and that plaintiff then and there negligently failed and refused to procure and use a ladder then and there nearby and furnished by defendant for that purpose, which said ladder would have enabled the plaintiff to reach and fill said lubricator or oil box on said engine without the necessity of plaintiff getting upon said engine at all.

Further answering said petition, defendant states and alleges that on or about August 13, 1937, and after the alleged injuries were received by the plaintiff and before this case or action was commenced by the plaintiff, the defendant paid to the plaintiff the sum of six hundred dollars ($600), and, in consideration of such payment to him of said sum of $600, plaintiff then and there and on or about August 13, 1937, agreed with defendant, by his written agreement then and there executed by plaintiff and delivered by him to defendant, as follows:

"In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, [fol. 19] to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit."

Defendant further states and alleges that plaintiff, before beginning or commencing this suit and action, did not tender or pay back to defendant, or any-one for him, said sum of $600 and that this suit and action have been begun and commenced by plaintiff without the pre-requisite return to defendant trustee of said sum of $600, and plaintiff could

not and cannot lawfully file or maintain this suit and action against defendant, and this action is pre-mature and should be dismissed by the Court.

Further answering said petition, defendant specifically denies that defendant, his agents, servants or employees violated the Federal Safety Appliance Act or failed to have grab irons on said engine or locomotive properly located where plaintiff could hold or grab onto said grab irons in the performance of his duties and specifically denies that defendant failed to furnish a running board on said engine or locomotive which was, as plaintiff alleges, too narrow or improperly placed, as prescribed by any rules of the Inter- [fol. 20] state Commerce Commission, if plaintiff was engaged at said time and place in interstate commerce.

Further answering said petition, defendant states that plaintiff is seeking to recover a verdict and judgment against defendant for damages under the Federal Employers' Liability Act and defendant states that recovery and enforcement of any such judgment in this case or action, if any, against defendant, and under the facts in evidence and as alleged in said petition, would deprive defendant of a right, privilege and immunity to which defendant is entitled and which defendant should be permitted to enjoy under said Federal Employers' Liability Act, as set forth and defined in Title 45, of the United States Code Annotated, and particularly under sections 51, 52, 53 and 54, thereof.

Wherefore, having fully answered the petition of plaintiff herein, defendant prays that he be discharged herefrom and go hence without day and recover of and from the plaintiff his costs herein.

Thos. J. Cole, Hiett, Covert & Hiett, David E. Blair,
Attorneys for Defendant.

As no appeal was granted plaintiff below and the action of the Trial Court was adverse on this point, the motion to [fols. 21-25] strike out part of the amended answer need not be set out. Plaintiff was permitted to dictate a general denial of defendant's amended answer into the record; but, as no point is made on that, it need not be noticed further.

Verdict—Appeal Granted

The action came to trial on March 7, 1940, before Judge William E. Barton and a jury, at Houston, Missouri, and,

on March 8, 1940, the jury returned a net verdict of $5,000 against defendant. Defendant was thereafter granted an appeal to this Court and the action is thus before this Court. The bill of exceptions, as far as the evidence is concerned, has been reduced to narrative form and the evidence is thus before the Court, and, as thus reduced to narrative form, the evidence was as follows.

Bill of Exceptions

Joe Smith, a Witness for plaintiff.

Direct examination.

By Mr. Myres.

Live at Nevada, Missouri. Aged 30 years and married. Worked for Defendant, beginning June 14, 1932, and working for defendant on day shift at time plaintiff was hurt. Worked around turn-table four years. Greased lubricator and operated electric motor and operated turn-table before and after plaintiff was hurt, and know how it works. The turn-table was about twenty feet from the roundhouse. Have not been working for defendant since December, 1936. Describes turn-table. Identifies picture of engine and turn-table. Exhibits "A" and "B" as follows:

[fol. 26] Turn-table was about 110 feet long and had a platform on each side of the engine about three feet wide, made of wood, with rails about two and four feet from platform. The lubricator on the engine was about five feet eight inches above the platform. I usually "stood on the railing with my foot agin the railing, on the railing and agin the steam cylinder, or climbed upon the running board and leaned over and inserted the spout in the top." That was the custom. Top running board was about 12 feet from the platform. The turn-table was operated by electric motor. When motor lever was in neutral, motor did [fols. 27-31] not move. The motor started the turn-table with a jerk. Here witness identified Exhibit "C," same was offered in evidence and is reproduced.

There is a brake in cab of the motor you pull on to slow motion down and "a lot of times you don't run right up and you have to get out and try it—there is a dog that fits in that rail, you might go a fraction too far and have to try it again."

Was not present when the accident to plaintiff happened. We were generally warned when turn-table or engine moved, and got down onto the platform or up into the cab of the engine.

Cross-examination.

By Mr. Blair:

Did not get discharged on account of drinking. Was not present when Duncan was hurt. Identifies Exhibit 1, which was a picture of the motor and was as follows:

[fol. 32] Motor was at one end of turn-table and power of electric motor moves turn-table. Some play between wheel that controls movement of motor and turn-table and this makes a sort of jerk in starting. There is some play in all machines. It was impossible to move motor "unless somebody is in that cab" and motor cannot be operated unless somebody is in the cab of the motor and has hold of the lever. It is perfectly stationary otherwise. The dog simply lines up the tracks with turntable.

Re-Direct Examination.

By Mr. Myres:

Am now employed by the Nevada Hospital.

Barker Duncan, Plaintiff, a witness for plaintiff.

Direct Examination.

By Mr. Myres:

Am the plaintiff. Live in Joplin, Missouri. Aged 51. Was 47 when injured. Relates railroad and other experience. Was making about $84 a month when hurt. (Appellant makes no contention as to extent of injuries and all testimony of plaintiff and others omitted as to that point.) My work was supplying engines. Shift was from 9 p. m. until 6 a. m. The accident happened about 1:30 a. m., April 10, 1936, on engine 1429. That engine was turned around. (Admittedly engaged in interstate commerce at the time.) Clark Everett was my immediate foreman and gave me orders. Wilhelmson, the hostler, DeGood, his helper, and Hicks, the engine inspector, were present.

[fol. 33] Q. Were there any outsiders or any strangers or any other people of any kind or description in or about the round-table immediately before this accident happened or immediately after, that you saw?

A. No, sir.

Lights on North side of Round House, but not on North side of engine. I was on North or west side of the engine, after the engine was turned around.

I was ordered by Everett to fill lubricator. The engine was headed North at that time. There was no ladder around. The lubricator was on the right or engineer's side of the engine. The turn-table not then moved. I got up with my right foot on the rail of the platform facing north with left foot on the jacket of the cylinder and put the snout of the oil can, probably eight or nine inches long, in the lubricator of the engine. Everett came along and spoke to me and I got down on the platform and turn-table stopped. I walked to the front of the engine and went up the steps to the running board and back to the lubricator. Couple of moments elapsed. No warning was given me that the engine was going to be moved again. Was stooping over the running board removing the oil can from the lubricator when "the turntable gave a sudden jerk and got me overbalanced and into the pit I went." Turn-table was moved East in same direction it had been moved, and I fell to the bottom of the pit and was injured. (As no point [fol. 34] is made as to the extent of the injuries plaintiff received, this portion of his testimony is omitted.)

Received call from claim department in Missouri Pacific Building in St. Louis. Saw Mr. Salters there and talked settlement with him.

Q. Up to that time had you ever settled your case or tried to settle your case or talked settlement of your case?

A. No, sir.

Q. When you went in did you ask Mr. Salter what he wanted with you?

A. Yes, sir.

Q. I will ask you to just tell the jury now, in your own words, what he told you?

A. I went in and asked Mr. Salters if he wanted me. He said, "Yes", he says, "I hear you have got a little sickness and you might want some money." I said, "That's right, I could use some money."

Q. Where was your wife at that time?

A. My wife was in the Missouri Pacific Hospital at St. Louis.

Q. Was she deceased there?

A. Yes, sir.

Q. While she was there in St. Louis?

A. She died in St. Louis.

Q. All right. Now, what did he say about your case?

A. He told me that my case was governed by the Missouri Workmen's Compensation Act and that up to date that it figured approximately $600 that I would have coming and asked me if I could use it. Naturally, I said, "Yes, I can use it."

Q. Now, when you were discussing that with him at that [fol. 35] time did you know whether or not your case was governed by the Missouri Workmen's Compensation Act or by the Federal Employers' Liability Act, did you know of your own knowledge?

A. No, sir, I did not.

Q. Did you have any idea under which law that it might be governed?

A. No sir.

Q. Now, Mr. Salter was the Claim Agent stationed in St. Louis, is that right?

A. Yes, sir.

Q. Had you known him prior to that time?

A. Yes, sir.

Q. Where was he stationed before he went to St. Louis?

A. At Carthage; I often seen him around Nevada.

Q. You knew him?

A. Yes, sir.

Q. He was—you know he is also a lawyer?

A. Yes, sir.

Q. Now, did you rely upon the statement that he made to you that your case was under the Missouri Workmen's Compensation Act?

A. Absolutely.

Q. And at that time did you believe it was under that Act?

A. Yes, I had no reason to disbelieve it.

Q. Now, after you had this discussion did he ask you to sign any paper before he would give you a draft for $600?

A. He did.

Witness identifies Exhibits D and E. Salters asked me to sign Exhibit D and I signed it after I asked him. "What is this, is this a release that you are asking me to sign?" [fol. 36] He said: "No, Sir, it is not a release, it is a formality that we have when we advance a person money on their claim." And I said: "Well, this states that you can't bring suit," and Mr. Salters said: "Now, Mr. Duncan," he said "we are going to take care of you as far as any suit is concerned, that is not necessary, because we are going to see that you are well imbursed for your injury." I would not have signed Exhibit D but for his statements. No one else signed Exhibit D but witnesses to my signature. No official of the railroad signed Exhibit D. Identified Exhibit E as check for $600, which I cashed. Salter gave me Exhibit E at the same time. After I signed check no official of Missouri Pacific made any effort to settle my case further and they refused to negotiate with me. I got the $600 and have paid no part of it back.

Q. Coming back now, Mr. Duncan, to the time that this turn-table was suddenly moved, I will ask you to state to this jury if there was any other individual other than employees of the Missouri Pacific Railroad in and around that table? • • •

A. No, sir.

DeGood moved the table the first time.

Cross-examination.

By Mr. Blair:

Myself, Wilhelmson, Clark, Everett, Hicks and DeGood were around and no one else. I was standing on platform and reaching over for the can when I fell. There was no movement of the engine itself, separate from the turn- [fol. 37] table. The turn-table moved and the engine moved sideways. The turn-table can only move when the motor is applied. Have operated the motor and am familiar with it. Electricity had to be applied by somebody, before motor would move. There had to be somebody in the cab, moving the lever, before the turn-table would move.

Looks like my signature at bottom of statement. I did not read statement. Did not say in my statement that "I don't know whether engine was moved before or at the time I fell" I signed the statement, but did not read it. The statement was taken by Ted Short.

Don't know who was first man to me. I saw DeGood there. I did not tell DeGood that I didn't know anything about the track being moved. I did not lose my balance and fall. Don't know of anybody that saw me go up on that engine. Don't know of a soul who knew I was up there.

Q. And you don't know of a soul who was in that electric motor that operated the turn-table at that time, do you?

A. Some employee was in there.

Q. That is your conclusion. You don't know that for you didn't see anybody go in, did you?

A. The employees operate it.

Q. And it could not have been moved unless somebody was in there and had hold of the lever.

A. Some employee had to move it.

Q. And you didn't see anybody in there, did you?

A. I wasn't looking at the cab or motor car, I will say. [fol. 38] I was attending to my own work, I was filling the lubricator.

I worked on that same engine a number of times. Light was furnished by a flash light and I could see. I don't know of anyone who knew I was up on the engine. I carried the draft around about a month before I cashed it. Shown letters tending to show attempts made to settle the claim; but they are omitted as they have no bearing on the issues presented by appellant.

Re-direct examination.

By Mr. Myres:

Had no ladder and not possible to use one on platform, as there was no room for it, nothing to keep ladder from slipping off. I always put oil in the lubricator the way I was doing when Everett came around and had been seen on the railing many times by the foreman.

Recross examination.

By Mr. Blair:

There were ladders in and around the round house, but they were never used for this purpose.

Exhibits D and E, identified by plaintiff, are as follows:

[fol. 39] PLAINTIFF'S EXHIBIT D

3-37--1M-N

(Pltff's. Ex. D. 3/7/40 A. L. F.)

(Photostatic copy of Agreement, marked Ex. 2, W. A. S.:)

Form 7606

(facsimile of seal:)

Missouri
Pacific
Lines

Guy A. Thompson, Trustee

Missouri Pacific Railroad Company, Debtor.

To Barker Duncan, 529 East Allison Street, DR. Nevada, Missouri. (Superscribed stamp:) Paid By Draft Audit No. 669 Month of August 1937 Paid by draft No. B-1736

AGREEMENT

On or about April 10th, 1936, while employed as Roundhouse Laborer at or near Nevada, Missouri, I was injured in the following manner: while working on and about engine No. 1429, I fell from the running board of this locomotive into the turntable pit and was then and thereby injured.

I have this day received from the Trustee of the Missouri Pacific $600.00 Railroad Company the sum of $600.00, and also the additional sum of $—. I sustained personal injuries in an accident as above set forth, the effects and extent of which are uncertain. Both of said sums are [fol. 40] paid to me at my request for living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of my claim against said Trustee for said injuries.

I agree that the payment of said sums of money to me shall not be considered as an admission of any liability on the part of said Trustee or the Railroad Company and I understand that the Trustee and the Railroad Company deny liability for my injuries.

In consideration of said payment of $600.00, I agree with

said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit. In consideration of said payment of $600.00, I covenant and agree with said Trustee and his successors that I will not commence suit against him, or them, or the Railroad Company, to recover damages for my said injuries in any courts except those sitting within the State where my injuries were sustained, or within the State where I resided at the time my injuries were sustained, and I covenant that I will not bring any such suit in any other court.

It is further agreed that the aforesaid sums of $600.00 and $— are the sole considerations for the respective agree- [fol. 41] ments herein; that said considerations are contractual and not mere recitals; that no representations or promises of any kind or character, not specified herein, have been made to induce the execution of this agreement or with reference thereto, or the matters and facts above mentioned; that in executing this agreement it is agreed that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries as well as the liability questions involved, and that I have not been influenced to any extent whatever by any statements regarding said injuries or regarding liability or any other matters made by said Trustee or by any other person or persons representing or acting for him, or by any physician or surgeon by him employed; and that all agreements and understandings between the parties above named or hereinbefore referred to are embodied and expressed herein.

Approved For Payment: (Signed) T. M. Niven, General Auditor. CBM.

Audited: (Signed) C. B. Moon, Auditor Disbursements.

Received St. Louis, Missouri, August 13th, 1937. Guy A. Thompson, Trustee, of Missouri Pacific Railroad Company, Debtor.

—Six Hundred and No/100— Dollars In Full For The Above Account.

(Sign here) (Signed) Barker Duncan

Witness: (Signed) O. L. Salter

Witness: (Signed) R. C. Wolfe

[fol. 42] PLAINTIFF'S EXHIBIT "E"

Pltff's. Ex. E 3/7/40 A. L. F. $600.00

(Photostatic copy of draft, marked on the back "Ex. 3, W. A. S.")

200 Bks - 50 Sets - 1-28 - - W Form 42-b

Trustee Account

Missouri Pacific Railroad Company

Office Of Claims Attorney

(facsimile of seal:)

Missouri
Pacific
Lines

No Protest

Dated at St. Louis, Mo., August 13th, 1937 No. B 1736

At sight, pay to the order of Barker Duncan —Six Hundred and No/100— Dollars, account of partial payment in settlement for injuries sustained on or about April 10th, 1936 at Nevada, Missouri, when employed as a Roundhouse Laborer.

(Signed) O. L. Salter, Claim Agent.

To W. J. Wright, Local Treasurer
Missouri Pacific Railroad Company
St. Louis, Mo.

(Copy of back of draft as follows:)

Endorsed on top as follows: Barker Duncan Hurlbut Und Co Newell G Hurlbut V. P.

[fol. 43] (Various clearing house stamps and stamped endorsements as follows:) Paid Through Joplin Missouri Clearing House Sep 14 1937 Pay To The Order Of Any Bank Or Trust Company All Prior Endorsements Guaranteed 80-49 First National Bank Joplin, Mo. 80-49 A. G. Cofer, Cashier Paid Sep 15 1937 Local Treasurer Sep 15 1937 St. Louis Clearing House Or Received Credit Through Federal Reserve Bank Of St. Louis Or Pay Any Bank, Banker, Or Trust Company All Prior Endorsements Guar-

anteed First National Bank In 4-5 St. Louis, Mo. 4-5 C. L. Allen. Cashier 308.

(Exhibits of defendant having to do with efforts to settle the case are omitted.) (Underscoring in Exhibits D and E merely show blanks filled in with typewritten signatures.)

Dr. W. E. Craig, By Deposition.

Dr. L. M. Dillman, Witness for Plaintiff.

(As deposition and testimony dealt exclusively with injuries and X-rays, it and the X-rays accompanying it are omitted.)

Plaintiff Rests.

DEFENDANT'S REQUESTED INSTRUCTIONS, REFUSED

Thereupon, at the close of the Plaintiff's case in chief, the defendant prayed the Court to give to the jury the following instruction, in the nature of a demurrer, as follows:

"A"

The Court instructs the jury that on or about August 13, 1937, the plaintiff, for a valuable consideration to him [fol. 44] paid by the defendant, to-wit, the sum of $600, agreed with defendant that he would not file or maintain a suit against defendant on the cause of action alleged in the petition, unless and until plaintiff should repay to defendant said sum of $600, and that repayment to plaintiff of said sum of $600 should be a prerequisite to the filing and maintenance of any suit on said cause of action, and that plaintiff did not repay said sum of $600 to defendant before commencing this action or suit, and that said contract is a complete bar to the further prosecution of the action now before the jury and that plaintiff cannot now maintain said suit or action, and the Court now withdraws this suit or action from further consideration by the jury and dismisses the same, without prejudice to plaintiff, and the jury is discharged herefrom.

Which Said Instruction was by the Court, at the conclusion of the argument of counsel, refused.

To which action, ruling and refusal of the Court to give said instruction to the jury the defendant trustee, by his

counsel, then and there duly excepted and at the time saved his exceptions, in the manner and form following:

Mr. Blair: The defendant excepts to the ruling of the Court in refusing defendant's Instruction A and refusing at this time to dismiss the case as requested in said instruction.

Thereupon, also at the close of the plaintiff's case in chief, the defendant prayed the Court to give to the jury [fol. 45] the following instruction, in the nature of a demurrer, as follows:

"B"

Now at the conclusion of the evidence offered by plaintiff in this case, the Court instructs the jury that, under the law and the evidence offered by plaintiff, plaintiff is not entitled to recover judgment against defendant and the verdict of the jury will be in favor of the defendant.

Which Said Instruction was by the Court, at the conclusion of the argument of counsel, refused.

To which action, ruling and refusal of the Court to give said instruction to the jury the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

DEFENDANT'S CASE

DR. LEMBECK, witness at trial for defendant.

(As all his testimony dealt with injuries same is omitted.)

THEODORE SHORT, Witness for Defendant.

Direct examination.

By Mr. Blair:

(Testimony omitted as it dealt entirely with alleged signing and reading of his statement by plaintiff. As that is no longer an issue the testimony is omitted.)

[fol. 46] ED WILHELMSON, Witness for Defendant.

Direct examination.

By Mr. Blair:

Live at Nevada, Missouri, and employed by defendant or by Thompson, Trustee, and was so employed April 10,

1936. Was hostler, with duty to handle engine to and from yards and to supply same with coal, water and sand. Was present in engine when plaintiff was hurt. Turn-table was not moved to my knowledge. I did not notice any movement. Don't believe that engine moved.

Cross-examination.

By Mr. Myres:

Could feel any little movement of motor, if I was standing up. Did not know when plaintiff fell.

Redirect examination.

By Mr. Blair:

Was on engine and heard no statement made by plaintiff after he was injured.

Recross-examination.

By Mr. Myres:

As to when statement of witness taken by claim agent.

J. G. DeGood, Witness for Defendant.

Direct examination.

By Mr. Blair:

Live Nevada, Missouri. Employed by defendant April 10, 1936, and present when plaintiff hurt. Still employed by defendant as helper to hostler. I operated turn-table at time the engine was turned around. I was not in motor cab when plaintiff was hurt. I was about 25 feet from plaintiff at engine on the turn-table. Saw plaintiff fall and [fol. 47] was first one to plaintiff. Plaintiff told me he did not know how he came to fall. He asked me if engine moved. Engine had not moved. Move engine with motor and move motor with electricity. The motor is in neutral when lever left straight up and down.

Q. Does the motor or the turn-table move when that is straight up and down?

A. No, sir.

Q. Is it possible to move it when it is up and down?

A. No, sir.

Q. State whether or not at the time that Barker Duncan fell there was anybody in this motor cab that control the movements of the round table?

A. To the best of my knowledge there was no one in it.

Q. You were not in it?

A. No, sir.

Q. And it is part of your duties to operate the motor to turn the round table?

A. Yes, sir.

Q. You had left this cab of the motor and was within about 25 feet of him when he fell?

A. Yes, sir.

Q. Were you operating the turn-table at that time?

A. No, sir.

Q. And when you left the cab state what position the lever was in that controls the power of the motor?

A. It was setting straight up and down just in neutral position.

Q. It was in neutral at the time you left. What did you do after you left the cab?

A. I walked out of the operating house and started for [fol. 48] the south end of the table to place a dog which locks the table to the track, we were going in on.

Q. And those dogs had not been put in position yet?

A. No, sir, I had not got there.

Q. That's all.

Cross-examination.

By Mr. Myres:

I was the first man to plaintiff. Denies first thing asked me was "who moved the engine."

Q. Why, didn't you just get through telling Judge Blair, here, that he asked if the engine was moved?

A. He asked me if the engine was moved.

Q. Yes, he asked you if the engine moved. Didn't he ask you who moved the engine?

A. No, he didn't ask me who moved the engine.

Q. But he wanted to know if it was moved, didn't he?

A. Yes, sir.

Q. That is the first thing he said to you, wasn't it?

A. Yes, sir.

Q. Now, you did move the engine that night, didn't you?

A. That night?

Q. Yes, that same engine.

A. We moved it out of the yards up to the round house, yes.

Q. Yes, and you put it on the table, didn't you?

A. Certainly.

Q. And then you moved it around, didn't you?

A Turned it around.

Q. And you were the one that was running the motor to turn it around, then, wasn't you?

A. That's right.

[fol. 49] Q. And since you were the hostler's helper that night, Mr. Wilhelmson's helper, it was your duty to line that engine up, wasn't it?

A. Certainly.

Q. And to see that it was ready to run off the track for that hostler?

A. Yes, sir.

Q. It was your duty and any movements there that night that was made you made them, didn't you?

A. Yes, sir.

Q. Regardless of what they were, you controlled that motor there that night in moving that round table, didn't you?

A. Certainly.

Q. There wasn't any strangers around there, outsiders around there, were there?

A. None that I knew of.

Q. Well, you don't know any?

A. Well, none that I knew of. I didn't see them, no.

Q. And don't you know Mr. DeGood—don't you know—let's get these pictures out, I want to see them. Don't you know that when you started this motor around here it was first headed north, wasn't it?

A. Yes, sir.

Q. And as it was headed north, then you turned that table on around, didn't you, to the west like this, brought her all the way around, isn't that right?

A. That's right.

Q. (Is handed pictures). You have to make about three or four attempts before you get that thing lined up so he can run off, don't you?

A. No, sir.

[fol. 50] Q. How many do you have to make?

A. One.

Q. Just one?

A. Just one.

Q. Never had to make over one in your life, did you?

A. No, sir. You have a spot there to go by.

Q. Uh-huh. But you can't always stop it on the spot, can you?

A. I can.

Q. You can?

A. I can.

Q. So you did move the engine that night, didn't you, all the way around there?

A. Turned it half way around.

Q. And you are not supposed to turn it when a man is up on there working around, are you?

A. Not if you knew he was up there, no.

Q. And you know that it is dangerous to move it when they are up there, too, don't you?

A. Well, no, not necessarily.

Q. Not necessarily?

A. No.

Q. Well, you have instructions from your foreman not to move it while they are up there, don't you?

A. Yes, we have those instructions.

Q. Yes, sir, and you are supposed to know that there is no men up there when you do move it.

A. When a man goes up there he is supposed to come and tell you.

Q. Well, you didn't look, then, that night, to see whether the plaintiff was up on the running board or not, did you?

A. Well, it was dark, you couldn't see.

Q. It was so dark you couldn't see?

A. Part of the time it was, part of the time.

[fol. 51] Q. But you could have seen. If you had walked around the engine you could have seen whether he was up on the running board or not, couldn't you?

A. Well, yes, I could. There was fellows working around the engine besides me.

Q. I understand, but didn't you know that the plaintiff here, Mr. Duncan, was the only one that was up on the running board at the time he fell?

A. I didn't know he was up there.

Q. Huh?

A. I didn't know he was up there.

Q. You would not have moved the engine if you had known he was, would you?

A. Well, without first cautioning him, no.

Q. And it was your duty to caution him, wasn't it?

A. If you knew he was up there, yes.

Q. Well, the foreman was right there in charge of this work, wasn't he?

A. I don't know whether he was right at this time or not but he was just a short time afterwards.

CLARK EVERETT, Witness for Defendant.

Direct examination.

By Mr. Blair.

Live now Cotter, Arkansas. General Foreman for Missouri Pacific at Cotter. Located at Nevada, Missouri, on April 10, 1936, when Plaintiff was hurt. Was then roundhouse foreman. Ed Wilhelmson was hostler, J. G. DeGood was helper to hostler. Hull was cellar packer. DeGood operated motor. Saw plaintiff there about 1:30 a. m.

Q. Did anybody else besides DeGood operate the motor that turned the table?

A. No, sir.

[fol. 52] Q. Now, how is that motor operated; by what kind of power?

A. Electric.

Q. And how is it applied; how was it at that time?

A. Well, you have a control lever and when the lever is in the center it is in neutral; it don't move either way and to go one way you throw it one position and to go the other way you throw it the other position.

Q. Is it possible for that lever to be moved or that mechanism to be moved without somebody having hold of the lever?

A. No, sir.

Q. When it is left in neutral?

A. It stays at neutral.

Witness described turn-table and how it operates. Know engine 1429. It was heavy and turn-table heavy. Turntable pit of concrete. Motor moves on track. Motor is in motor house and attached to turn-table.

Q. Now, were you present when the plaintiff, Barker Duncan, was picked up out of the bottom of the pit?

A. Yes, sir.

Q. Did you ask him how it happened?

A. Yes, sir.

Q. What did he say?

A. He said he didn't know.

Q. He said he didn't know what happened?

A. Yes, sir.

Was on turn-table at time this happened. Was on left side of engine with Hicks. Before accident, I saw [fol. 53] plaintiff on hand rail of platform filling lubricator.

Q. What did you say to him, if anything?

A. I stopped and took Mr. Duncan by the leg of the overalls and I told him it was a hell of a long ways down to the bottom of the turn-table, that he had better get down.

Q. State whether he did or not?

A. He did.

Q. State whether the turn-table was in motion?

A. It was in motion at that time.

Q. It was in motion at that time? Did you see what became of Duncan after that?

A. No, I left him standing on the turn-table.

Q. And had you any knowledge that he was on the platform of the engine?

A. No, sir.

Q. When did you first know about the accident?

A. Well, I was on the left hand side of the engine and walked back to the right hand side and saw him in the turn-table pit.

Q. You saw him down below?

A. Yes, sir.

Q. Who was with him at that time?

A. No one.

Q. By himself. Were you the first one to him?

A. No, sir.

Q. Who was the first one to him?

A. Mr. DeGood.

Q. Mr. DeGood. When was it you asked him how it happened?

A. After I got down in the pit.

Q. That is when he told you that he didn't know?

A. Yes, sir.

[fol. 54] Cross-examination.

By Mr. Myres:

Was foreman and partly responsible for work done. I gave the orders. Turn-table did not start after engine turned around. Have been promoted since accident. Am now getting $300 per month. Claim agent did not get to me for a month after accident. No investigation made other than statements. Don't remember when claim agent came. DeGood had operated motor. He gave no warning before plaintiff was hurt, as I heard no warning. We fill out forms for accidents as soon as possible. There are no demerits in the mechanical department.

Redirect examination.

By Mr. Blair:

I told plaintiff to get down off of the rail of turn-table and to wait until engine got on coal chute incline to fill lubricator. I was on other side of the engine when accident happened.

Recross-examination.

By Mr. Myres:

I ordered plaintiff to fill lubricator.

Redirect examination.

By Mr. Blair:

Work of lubrication partially done when I saw plaintiff on rail.

Grant Hicks, Witness for Defendant.

Direct examination.

By Mr. Blair:

Live at Nevada, Missouri. Was machinist for Missouri Pacific at time plaintiff hurt. Was then locomotive inspector. Was on turn table when plaintiff hurt. Was with Clark Everett. Heard Everett ask plaintiff to get down

[fol. 55] off of rail. Did not see the accident. Went around to that side of the engine when I heard some one fall.

Q. I will ask you to state whether or not the round table on which the engine was resting was moved at that time?

A. No, sir, the engine was setting still at that time.

Q. For how long had it been in that shape?

A. Well, just a very short time.

Q. Just made the turn, completed the turn?

A. Yes, sir.

Heard no statement by plaintiff. Went down in pit and helped Plaintiff out.

Cross-examination.

By Mr. Myres:

Was with Everett and heard no statement. Everett got down in pit ahead of me. Got down close together. Heard plaintiff talking; but paid no attention to it. Make $175 a month now. Was making about $200 a month at the time of the accident. Claim agent came to me about a month later.

Redirect examination.

By Mr. Blair:

Shown statement and fixes May 8th as day claim agent came. Says Everett, DeGood, Hull, Wilhelmson and himself only ones there besides plaintiff.

Recross-examination.

By Mr. Myres:

No one else present except persons named. No one there except Missouri Pacific employees. No one except Missouri [fol. 56] Pacific employees could have moved motor.

B. F. Hull, Witness for Defendant.

Direct examination.

By Mr. Blair:

Live at Nevada, Missouri. In employ of Missouri Pacific and present when plaintiff hurt April 10, 1936. Was ma-

chinist's helper and cellar packer. Was on engine 1429. This engine had been there frequently. Was at west side of the turn-table when plaintiff had accident. I heard him scream. Turn-table did not move. Saw DeGood at the other end. He was not in the motor cab at the time of the accident.

Cross-examination.

By Mr. Myres:

Employed last time since September, 1923. Have had 31 years experience. If juice left on too long, motor would go by point. If turn-table went too far, operator would have to move it back. This occurred frequently. Did not move turntable without warning.

Redirect examination.

By Mr. Blair:

Was on fireman's side of the engine. There was no movement at the time.

O. L. Salter, Witness for Defendant.

Direct examination.

By Mr. Blair:

Live Richmond Heights, Missouri. Lawyer and Claim agent for Missouri Pacific. Was not present at time of acci- [fol. 57] dent. Lived in Carthage, Missouri, then. Investigated this accident and made $600 payment to plaintiff.

Q. I will ask you to state to the jury what was said at the time, said to Mr. Duncan by yourself or Mr. Duncan to you at the time that you paid him this $600, and took this statement—took this contract?

A. Well, Mr. Duncan came to the office that morning and when he came into my desk he stated he came in to see if he couldn't get some money in connection with his accident; that his wife was in the hospital, he was getting behind with his debts and he was badly in need of some money.

Q. What did he do then?

A. Well, I wasn't through. You asked me to tell all that was said, didn't you?

Q. Yes.

A. I explained to Mr. Duncan that—first, I asked him how much he needed, what he could get by on and that I would take it up with Mr. Butler to see if it could be arranged.

Q. Who was Mr. Butler?

A. Assistant Claim Attorney and my superior. So, finally, I don't recall whether these amounts were discussed or not but in any event $600 was the eventual figure that he thought would tide him over.

Q. I will ask you if that is your signature to Exhibit E?

A. Yes, sir.

Q. You signed that as claim agent for the Missouri Pacific Railroad?

A. Yes, sir.

[fol. 58] Q. What was done at the time as to giving Duncan a copy of the Plaintiff's Exhibit D?

A. I gave him a copy of it.

Q. And what about Exhibit E, what did you do with that?

A. He took that away, with the copy I gave him.

Q. Had you paid him any money at that time?

A. No cash.

Q. No cash, just give him that draft?

A. Just the draft.

Q. And state if you told him at that time that his case was under the Missouri Workmen's Compensation Commission?

A. I told him it was not under the Compensation.

Q. Did you have any negotiations with Duncan after you paid him the $600 or executed this draft?

A. Now, that was on January 29th.

Q. That was 1937?

A. 1938.

Q. Or '38, correct.

A. So after he submitted a counter proposal I told him that I would resubmit the matter on the figure he proposed but it could not be gotten before the management before Monday, January 31, 1938, and if he would return on Tuesday morning, February 1st, I would see if the management would be willing to increase this original authorization.

Q. Did he stay, or did he come back?

A. Well, he had a little conversation, then, about whether he should go to Nevada and return; and something was said about if he went to Nevada he would have to come right back

[fol. 59] and he believed he would just stay there. Whether he did or not I don't know but he did return on February 1st, 1938, and then we had further discussion in which I told him I was unable to get the authorization which I had offered him on the 29th increased.

Q. That is, let me understand you. At that time in February, 1938, he had previously made an offer of a certain amount?

A. On January 29th.

Q. And that is the authority that you were not able to get?

A. That's right. I told him I would try to get that but couldn't—it would go before the management for their consideration on Monday, for him to come back on Tuesday and I would let him know.

Q. Did you have any—then, you state as a fact that you did have some further talk with Mr. Duncan about settling this case after Exhibit E or D, was signed?

A. Yes, sir, this was August 13, 1937. We had no discussions between that date, that I recall, and January 29, 1938. February 1st, 1938, was the last discussion that he and I personally had, but after that he and Mr. Amos had correspondence about the matter.

Q. Well, were you present?

A. I am out of it after February 1st, 1938.

Q. Who is Mr. Amos?

A. Claims Attorney.

Q. He is the head man of the claim department?

A. That's right.

Q. J. H. Amos, of St. Louis?

A. Yes, sir.

[fol. 60] Cross-examination.

By Mr. Myres:

Live same place as Mr. Short. Have been a lawyer since 1929. Started in Kansas City. Have been claim agent since July 16, 1927. Made investigation in this case at Nevada, May 8, 1936.

Q. And you investigated the question of whether this case was under the Federal Employer's Liability Act or whether it was under the Missouri Workmen's Compensation Act?

A. Yes, sir.

Q. And you knew in May, 1936, after this accident happened on April 10th, that this case was under the Federal Employer's Liability Act, didn't you?

A. Yes, sir.

Q. And if you did—whether you did or didn't—but if you did make a statement that this case was under the Missouri Workmen's Compensation Act in August of 1937, that statement was a false statement, wasn't it?

A. If I made it.

Mr. Hiett: Well, we object to that.

Mr. Myres: Well, was it true or untrue?

The Court: Objection sustained.

Mr. Myres: Was it true or untrue?

Mr. Hiett: The same objection.

The Court: Objection sustained.

Q. Well, you knew in August, 1937, that this case was under the Federal Employer's Liability Act and not under the Missouri Workmen's Compensation Act?

Mr. Blair: We object to that as repetition.

The Court: Objection overruled.

[fol. 61] To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

Q. You knew that?

A. Yes, ever since May 8th, 1936. There has never been any doubt in my mind, Mr. Myres.

Q. So when Mr. Duncan discussed with you in St. Louis about this case you were making statements of fact which you had actual knowledge of as a result of your investigation?

Mr. Blair: Now, we object to that, that is not a proper question.

The Court: Objection sustained.

Q. Well, did you have any knowledge—you had personal knowledge of these facts, did you, Mr. Salters?

A. Yes, Mr. Myres.

Probably heard of accident within 48 hours. I wrote with typewriter the words: "Account of partial payment in settlement for injuries sustained on or about April 10, 1936 at Nevada, Missouri, when employed as a round house laborer." Wrote all but printed part. I signed Exhibit

"D" as a witness. Wolfe's name appears as a witness. No other Missouri Pacific person present at the time.

Redirect examination.

By Mr. Blair:

Gave plaintiff copy of Exhibit "D" at time he got draft. I explained to plaintiff that the $600 was not compensation and that I had checked consist of train and it had inter-
[fol. 62] state cars in it. Told Duncan his case was under Federal Act.

Q. Well, what did you say to Duncan about it being compensation?

A. Well, that's what I'm trying to tell you, Mr. Blair. And that, since it was not a compensation that under the Federal Act we had always heretofore just taken one release, but so many employees, when they had a long disability period like he had had, of a year or more, and their debts increased and they came in, so something had to be done and this form was devised so they could help them out just as well under the Federal to tide them over until they had their recovery before we negotiate final settlement.

Q. State whether or not you told him at that time that his case was under the Missouri Workmen's Compensation Commission?

A. I told him it was not under the Missouri Workmen's Compensation Commission if it had been we would have been paying him every two weeks since the date of the injury.

Recross-examination.

By Mr. Myres:

Plaintiff came into the office on crutches or on cane. I knew plaintiff's condition.

Q. And you further knew that the statute of limitations would run on his cause of action on the 10th day of April in 1938 less than eight months afterwards, you knew that, too, didn't you?

[fol. 63] A. Never fear, he didn't know it, I emphasized it to him three or four times.

Q. And you knew that——

A. (continuing) I told Mr. Duncan to be sure and watch that date.

Q. And you knew or thought you knew that if he did not pay back the $600 he could not file suit against your company, you knew that?

Mr. Blair: We object to that, the contract is the best evidence.

The Court: Objection overruled.

To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

Mr. Myres: —You knew that, didn't you?

A. I knew that this contract said that in plain wording.

Q. Yes. You knew that unless he paid it back or you thought that he couldn't file suit, didn't you?

A. That was my understanding.

Mr. Blair: I object as immaterial, what he thought.

The Court: Objection overruled.

To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

A. That was my understanding at the time this agreement was executed; that if he should decide to file suit that he would reimburse us to the extent of $600, yes sir.

[fol. 64] By Mr. Myres:

Q. And you knew that as far as that contract was concerned the Missouri Pacific didn't have to make any effort to settle this, too, didn't you?

Mr. Blair: I object to that question.

The Court: Objection overruled.

To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

Mr. Myres: You knew that, too, didn't you?

Mr. Blair: Just wait a minute, I want to state my reasons why I object to that. I object to it because it is immaterial what he knew and the contract itself is the best evidence of what it purports to be.

The Court: Well, there is a question of good faith about his statements if he made any. I think it is admissible. Objection overruled.

To which ruling of the Court the defendant trustee, by his

counsel, then and there duly excepted and at the time saved his exceptions.

A. Frankly, I hadn't thought about it.
Q. That's all.

Mr. Blair: That's all.
Mr. Myres: No, wait, just one more question, Mr. Salter.

A. Yes, sir.

Mr. Myres: You knew that this man's wife was down here in the hospital and was on her deathbed at the time, didn't you?
[fol. 65] Mr. Blair: Now, wait a moment. We object to that as immaterial.
The Court: Objection overruled.
To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.
Mr. Myres: You knew that, didn't you, when he came into the office? You knew that his wife was down there in the hospital and finally died there in the hospital?

A. To the last question I will say yes. To the first, no. I didn't know she was on her deathbed, I knew she was in the hospital, he told me so.
Q. You knew that she was sick?
A. That's right, he told me so and I took his word for it.
Q. That's all.

Mr. Blair: Defendant rests.
And here the defendant closed his case.
The Court: Has the plaintiff anything further?
Mr. Myres: Nothing further, your Honor.

Defendant's Refused Instruction at Close of Case

Thereupon, at the close of all the evidence in the case the defendant prayed the Court to give to the jury on his behalf the following instruction in the nature of a demurrer.
[fol. 66] Defendant's refused demurrer:

D. R. C.

Now at the conclusion of all of the evidence in this case, the Court instructs the jury that, under the law and all of the evidence in this case, plaintiff is not entitled to recover judg-

ment against the defendant, and the verdict of the jury will be in favor of the defendant.

Which Said Instruction was by the Court refused.

To which action, ruling and refusal of the Court to give said instruction to the jury the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

PLAINTIFF'S GIVEN INSTRUCTIONS

Thereupon, the plaintiff, by his counsel prayed the Court to give to the jury, on his behalf the following instruction, which said instruction the Court did give to the jury on the part of the plaintiff, to-wit:

Plaintiff's Given:

No. 1

The Court instructs the jury that this case is being tried under the Federal Employers' Liability Act, as the plaintiff and the defendant admit that both the plaintiff and the defendant were engaged in interstate commerce at the time of the accident.

[fol. 67] Therefore, the Court instructs you that if you shall find and believe from the greater weight or preponderance of the evidence that plaintiff was a shop laborer in defendant's roundhouse at Nevada, Missouri, on the 10th day of April, 1936, and that at about the hour of 1:30 o'clock in the morning on said date plaintiff was servicing the lubricator on locomotive No. 1429, which had been placed upon the turn-table in the roundhouse, if you so find, and that plaintiff was filling the lubricator and was standing in a stooping position on the runningboard of the locomotive, if you so find, and that the agents, servants, and employees of the defendant in charge of operating the motor of the turn-table knew, or in the exercise of ordinary care could have known, that plaintiff was so situated, if you so find, and that while so situated, an agent, servant, or employee of the defendant, in charge of the movement of the turn-table, suddenly and without warning, and contrary to a custom of long standing, if you so find, moved, or caused the turn-table and engine thereupon to be moved, if you so find, and that such conduct on the part of such agent, servant, or employee of the defendant, if you so find, was not in the exercise of ordinary care, under all the facts and circumstances, then

you are warranted in finding the defendant guilty of negligence, and if you find that such negligence, if any, in whole or in part, was the direct and proximate cause of plaintiff being thrown from the locomotive and turn-table into the concrete turn-table pit, and injured, if you so find, then your [fol. 68] verdict should be for the plaintiff; provided, you further find that he did not assume the risks as hereinafter defined, and that the loan or partial settlement agreement relied upon by the defendant was procured by fraud and misrepresentation, as hereinafter defined.

To which action of the Court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The Plaintiff, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court did give to the jury on the part of the plaintiff, to-wit:

Plaintiff's Given:

No. 2

The Court instructs the jury that the defendant has set up in his Answer as a defense to plaintiff's recovery a loan or partial settlement agreement, whereby plaintiff secured $600, pending further negotiations for a settlement of the plaintiff's cause of action, and which sum of money was to be returned to the defendant before instituting any suit.

Therefore, if you shall find and believe from the greater weight or preponderance of the testimony that plaintiff was [fol. 69] induced to execute and sign such instrument, by defendant's claim agent, or agents, representing to him his cause of action was governed by the compensation laws of the State of Missouri, if you so find, and if you further find that the defendant, his agents, servants, and employees further represented to the plaintiff that the said payment of $600 was only a partial settlement of plaintiff's cause of action before the Missouri Workmen's Compensation Commission, if you so find, and that such representations were false and untrue, and were known to the defendant to be false and untrue, if you so find, and that plaintiff relied upon said representations as being true, and was thereby induced to sign said instrument, if you so find, then such instrument is no defense to this cause of action, but if you

find the issues for the plaintiff in a sum greater than $600, you should give the defendant credit for the sum of $600, thereby reducing the amount of his recovery, if any, to the extent of $600, with interest thereon at the rate of six per cent (6%) from the date of its receipt.

To which action of the Court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The Plaintiff, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruc-
[fol. 70] tion, which said instruction the Court did give to the jury on the part of the plaintiff, to-wit:

Plaintiff's Given:

No. 3

The Court instructs the jury that a servant assumes the ordinary risks incident to his employment, but he does not assume risks arising out of the master's negligence, unless such risks and dangers arising therefrom are known to and appreciated by the servant, or are so obvious that an ordinarily prudent person, under all the circumstances, would have known and appreciated the same.

In this connection you are further instructed that if you should find that the risks herein were not ordinary, but arose out of the negligence of the defendant, as in other instructions defined, and if you should further find from the greater weight or preponderance of the testimony, and from all the facts and circumstances shown by the evidence, that an ordinarily prudent person, in the position of plaintiff, would not have known and appreciated the risks and dangers of the turn-table being suddenly moved without warning, if you so find then you are instructed that the plaintiff did not assume the risks and you cannot find for the defendant on its defense of assumption of risk.

[fol. 71] To which action of the Court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The Plaintiff, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court did give to the jury on the part of the plaintiff, to-wit:

Plaintiff's Given:

No. 4

The Court instructs the jury that by the term "greater weight or preponderance of the testimony," as used in these instructions, does not necessarily mean a greater number of witnesses testifying to a certain fact or set of facts, but means that degree of proof which satisfies your mind as to the truth of a particular fact, or set of facts, testified to, and applying your knowledge of human affairs and conduct, you will arrive at your verdict from the evidence presented, and by the law as given you in the instructions of the Court.

To which action of the court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

[fol. 72] The plaintiff, by his counsel, also prayed the court to give to the jury, on his behalf, the following further instruction, which said instruction the court did give to the jury on the part of the plaintiff, to-wit:

Plaintiff's Given:

No. 5

The court instructs the jury that by the term "ordinary care," as used in these instructions, is meant that degree of care which an ordinarily prudent person would use under the same or similar circumstances.

That by the term "negligence," as used in these instructions, is meant the failure to use ordinary care.

To which action of the court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The plaintiff, by his counsel, also prayed the court to give to the jury, on his behalf, the following further instruction, which said instruction the court did give to the jury on the part of the plaintiff, to-wit:

[fol. 73] Plaintiff's Given:

No. 6

The Court instructs the jury that if you find the issues for the plaintiff, you should, in assessing his damages, take into consideration the nature, character, and extent of his injuries, if any; you should also take into consideration all

suffering of mind and body, if any, which you may find and believe from the evidence he has already sustained, as a direct result of said injuries, if any; you should also take into consideration all suffering of mind and body which you may find from the evidence that he will sustain and endure in the future as a direct result of his injuries, if any, you should take into consideration all loss of wages you may find from the evidence that he has already sustained as a direct result of his injuries, if any; and you should also take into consideration all loss of wages that you may believe plaintiff will sustain in the future, as a direct result of his injuries, if any; and in all, you should give plaintiff such a sum as you may believe and find from the evidence will be a fair and reasonable compensation to plaintiff for said injuries, and in this connection you are instructed that plaintiff has admitted receiving, and defendant has admitted paying, the sum of $600.00 as a partial payment to plaintiff on account of his injuries, and you should deduct or subtract from the amount of your verdict for plaintiff, if any, the [fol. 74] sum of Six Hundred ($600) Dollars, which has already been paid plaintiff.

In this connection you are further instructed that if you should find by the greater weight or preponderance of the testimony that the plaintiff was guilty of any contributory negligence, as relied upon by the defendant, and that such negligence directly contributed to his injuries, if any, you should reduce the amount of his recovery in proportion as his negligence, if any, bears to the combined negligence of the plaintiff and the defendant, if any.

To which action of the court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

DEFENDANT'S GIVEN INSTRUCTIONS

Thereupon, the defendant trustee, by his counsel, prayed the court to give to the jury, on his behalf, the following instructions, and each of them, which said instructions and each of them, the court did give to the jury on the part of the defendant, to-wit:

Defendant's Given:

D. G. 7

There is no evidence in this case that defendant, his agents, servants or employees negligently or carelessly

[fol. 75] failed to furnish to plaintiff reasonably sufficient light for plaintiff to do the work on which he was engaged on the engine of defendant at the time he fell from said engine or that the running board of said engine was too narrow or insecure for plaintiff to stand upon in doing his said work on said engine, and the jury will disregard all evidence bearing upon such alleged grounds of negligence alleged in the petition.

Defendant's Given:

D. G. 8

There is no evidence in this case that defendant, his agents, servants or employees violated the Federal Appliance Act or failed to have grab irons on the engine mentioned in evidence properly placed or located where plaintiff could hold or grab onto such grab irons in the performance of his duties at the time plaintiff went upon said engine or failed to furnish to plaintiff for his said work a running board on said engine that was too narrow or improperly placed or located, as prescribed by the Rules of the Inter-State Commerce Commission, and the jury will disregard all evidence in this case having any bearing on such acts or failures to act, as alleged in plaintiff's petition.

[fol. 76] Defendant's Given:

D. G. 9

"Reasonable" or "ordinary care," as those words or terms are used in these instructions, mean such care and caution as persons of ordinary care and prudence usually exercise under like or similar condition, and "Negligence" is the failure to exercise reasonable or ordinary care under the particular circumstances.

Defendant's Given:

D. G. 10

The Court instructs the jury, although you may believe and find from the evidence that at the time the plaintiff signed the contract not to sue, read in evidence, he was suffering great pain on account of the injury to him, yet, such fact, if you find it to be a fact, would not render the contract not to sue invalid but you must believe and find from

the greater weight of the evidence that such pain, if any, on the part of the plaintiff, amounted to inability on his part to comprehend and understand the terms and effects of the contract he was signing.

Defendant's Given:

D. G. 11

Plaintiff's charge against defendant in this case is negligence on the part of defendant, his agents, servants, or [fol. 77] employees, which negligence, if any, is defined to you by the Court in other instructions which the Court has given to you, and plaintiff alleges that such negligence caused or contributed in whole or in part to the injuries received by plaintiff. The charge of negligence thus made is not presumed to be true, merely because plaintiff may have been injured as the result of a fall from defendant's engine or locomotive on defendant's turntable. Plaintiff must prove by the greater weight or preponderance of the evidence in this case that defendant, his agents, servants or employees were negligent in the manner, and only in the manner, submitted to you by the Court in his instructions, and that such negligence, if any, caused, or contributed in whole or in part, to the injuries sustained by plaintiff.

If you believe that the evidence upon any issue of fact, as thus submitted to you by the Court, is equally balanced, then it is your duty, as jurors, to find such issue of fact in favor of defendant.

Unless the plaintiff has thus proven negligence on the part of defendant, or the agents, servants or employees of defendant, in the course of their employment by defendant, as such negligence, if any, is defined to you by the Court, and that such negligence, if any, caused, or contributed in whole or in part to cause, injury to the plaintiff, you will find the issues in favor of defendant and return your verdict in this case in favor of defendant, even though you [fol. 78] may find that plaintiff was injured in a fall from said engine or locomotive of defendant.

Defendant's Given:

D. G. 12

Unless the jury believes and finds from the greater weight or preponderance of the evidence that plaintiff was caused to fall from the engine, mentioned in the evidence, down

into the bottom of the concrete floor of the turntable mentioned in evidence, by negligence, in whole or in part, as defined in these instructions, of some employee of defendant acting within the scope of his employment for defendant at the time, the verdict will be for the defendant.

Defendant's Given:

D. G. 13

The Court instructs the jury that, if you believe and find from the evidence in this case, that falling off of an engine or locomotive was one of the usual risks and hazards of the work in which plaintiff was engaged at the time for defendant, and that said fall from said engine or locomotive was not caused or contributed to in whole or in part by the negligence of defendant, his agents, servants or employees, as such negligence, if any, is defined to you by the Court in the instructions given to you by the Court, you [fol. 79] will find the issues in favor of the defendant, no matter how severely plaintiff may have been injured as the result of a fall from said engine or locomotive into the pit of the turntable below said engine or locomotive.

Defendant's Given:

D. G. 14

Unless you believe and find from the greater weight or preponderance of the evidence in this case that defendant, or the agents, servants or employees of defendant, in the course of the performance of their duties for defendant, negligently or carelessly moved the engine or the turntable, mentioned in the evidence, while plaintiff was at work on said engine, knowing at the time, or reasonably could have known, that plaintiff was at work on said engine and that movement of said engine or turntable was liable to cause injury to plaintiff, you will find the issues against plaintiff and in favor of defendant on that ground of negligence alleged in plaintiff's petition.

Defendant's Given:

D. G. 15

Even though the engine or turntable, or both of them, were moved by some agent, servant or employee of defend-

ant while plaintiff was on said engine, doing work thereon or thereabouts, still you will not be authorized to find the issues in favor of plaintiff and against defendant, unless [fol. 80] you further find from the greater weight or preponderance of the evidence in the case, that the person who moved the same, if so moved, knew, or reasonably should have known, that plaintiff was upon said engine and likely to be injured by such movement, if any, and that such person so moving the same, if moved, was at the time engaged in the scope of his employment by defendant.

Defendant's Given:

D. G. 16

In determining any issue of fact in this case, you are not confined to direct evidence in regard to such issue of fact; but are at liberty to determine such issue of fact from all of the facts and circumstances in evidence.

Defendant's Given:

D. G. 17

If you find and believe that the fall of plaintiff to the pit floor of the roundtable was an accident and without fault of anyone, you will find the issues for the defendant.

Defendant's Given:

D. G. 18

You are the sole judges of the evidence in this case and of the weight, value and credit to be given to the testimony of the various witnesses who have testified in this case. [fol. 81] In determining what weight, value or credit you will give to the testimony of any particular witness, you should take into consideration the interest, if any, such witness may have in the result of this trial, the reasonableness or unreasonableness of the testimony of such witness, the opportunity such witness has had to know and to be informed about the matters concerning which such witness has undertaken to testify, the relationship of such witness to the parties in the case, the manner in which such witness testified while on the witness stand, the apparent bias or prejudice of such witness, if any, together with the apparent inclination of such witness to be frank and to speak

the truth while testifying as a witness before you, and, taking all of these matters and things into consideration, you should give to the testimony of each witness such weight, value and credit as you may believe such testimony to be entitled to receive, and, if you believe that any witness has intentionally testified falsely as to any material issues in this case, that is as to any matter bearing upon the issues in the case, as defined by the instructions given to you by the Court, you are at liberty to disregard the whole or any part of the testimony of such witness.

You should weigh all of the testimony in this case in accordance with the rule given to you in this instruction and return your verdict solely upon the evidence heard by [fol. 82] you and submitted for your consideration by the Court, under the instructions given you by the Court, and allow no outside considerations whatever to enter into your determination of your verdict.

THE COURT'S INSTRUCTIONS

Thereupon, the Court, of its own motion, gave to the jury the following instruction, to-wit:

The Court's Given:

C. G. 19

Nine or more of your number concurring may agree to and find a verdict in this case.

If the entire panel agree to a verdict it should be signed by some one of your number as foreman; but if your verdict is agreed to by a less number than the entire panel, that is, by nine or more, but less than twelve, then each Juror who agrees to it must sign it.

DEFENDANT'S REFUSED INSTRUCTIONS

Thereupon, the defendant trustee, by his counsel, prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused to give to the jury on the part of the defendant, to-wit.

[fol. 83] Defendant's Refused:

D. R. D.

There is no evidence in this case that defendant, his agents, servants or employees negligently or carelessly or-

dered or directed plaintiff to perform his work in connection with placing oil in the lubricator of the engine mentioned in the evidence, and such ground of alleged negligence is withdrawn from the consideration of the jury.

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The defendant, trustee, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused to give to the jury on the part of the defendant trustee, to-wit:

Defendant's Refused:

D. R. E.

There is no evidence in this case that the engine or turntable mentioned in evidence were moved by an agent, servant or employee of defendant, in the course of the employment of such agent, servant or employee of defendant, while plaintiff was upon said engine, and you will disregard all [fol. 84] evidence bearing on that issue of fact and find the issues in favor of defendant on such issue of fact.

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The defendant trustee, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused to give to the jury on the part of the defendant trustee, to-wit:

Defendants' Refused:

D. R. F.

There is no evidence in this case that defendant, his agents, servants or employees negligently or carelessly failed to furnish to plaintiff a reasonably safe place for plaintiff to reach the lubricator mentioned in evidence and such alleged ground of negligence on the part of defendant is withdrawn from the consideration of the jury.

To which action of the Court in refusing to give said

instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The defendant trustee, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused [fol. 85] to give to the jury on the part of the defendant trustee, to-wit:

Defendant's Refused:

D. R. G.

The Court instructs the jury that if you believe and find from the evidence that the contract not to sue, introduced in evidence, was read by plaintiff, and after such reading by the plaintiff, the plaintiff signed the same, then the law presumes that the plaintiff at the time he signed the same was a person of sound mind and capable of comprehending the business in which he was engaged and the nature of the contract he was making; and the Court further instructs you that the burden is upon the plaintiff to prove by the greater weight of evidence that at the time he signed the release that he was incapable of comprehending the business in which he was engaged and the nature of the contract he was making, unless you believe and find from the evidence that the plaintiff has so proven such facts, then the plaintiff is bound by the terms of said release and your verdict must be for the defendant.

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

[fol. 86] The defendant trustee, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused to give to the jury on the part of the defendant trustee, to-wit:

Defendant's Refused:

D. R. H.

If the jury finds and believes that plaintiff had knowledge of the presence of the concrete pit of the turntable and further finds that an employee of the defendant was

liable to fall into said pit and be injured by said fall, and that a fall from an engine into said pit was liable to happen to one on said engine, without negligence of the defendant or any of his employees as defined by the instructions of the court, then the fall from said engine into such pit was one of the usual and ordinary risks and hazards of the business in which plaintiff was engaged for defendant and plaintiff cannot recover.

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The defendant trustee, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused [fol. 87] to give to the jury on the part of the defendant trustee, to-wit:

Defendant's Refused:

D. R. I.

If you find and believe that losing his balance and falling from the engine, if plaintiff did lose his balance and fall from said engine, was one of the usual risks and hazards of the business in which plaintiff was engaged in his work by defendant then such risk and hazard were assumed by plaintiff and your verdict must be for the defendant.

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The defendant trustee, by his counsel, also prayed the Court to give to the jury, on his behalf, the following further instruction, which said instruction the Court refused to give to the jury on the part of the defendant trustee, to-wit:

Defendant's Refused:

D. R. J.

If you believe and find from the evidence in this case that plaintiff climbed on the engine mentioned in the evidence and, without fault or negligence on the part of de- [fol. 88] fendant, his agents, servants, or employees as such

negligence, if any, is defined to you in the instructions of the Court, lost his balance and fell from said engine down into the concrete pit of said turntable and was injured as the result of such fall, you will find the issues against plaintiff and in favor of defendant, no matter how severely plaintiff may have been injured as the result of such fall from said engine.

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

And these were all of the instructions asked, given, and refused, on the trial of the above entitled cause.

And Thereupon, on said 8th day of March, 1940, the last day of the trial, upon the evidence offered and set forth hereinabove, and upon the instructions given, counsel proceeded to argue the cause to the jury, and during the argument there were no exceptions saved.

And Thereafter, and during said regular term of said court, to-wit: on said 8th day of March, 1940, the last day of the trial, at the conclusion of the argument of counsel, the Court, upon the evidence offered and set forth hereinabove, and upon the instructions given, submitted said cause to the jury for its consideration, in the manner and form following, to-wit:

[fol. 89] The Court: Gentlemen, on this separate sheet you will find two blank verdicts. If you find for the plaintiff, use the upper one and fill in the blanks as is indicated there and someone sign it as foreman, unless nine or more of you return the verdict, and then you will return your verdict according to the last instruction. If you find for the defendant use the last one and execute it in the same way.

Whereupon, to-wit: at 5 o'clock p. m. on said 8th day of March, 1940, the jury retired to their room to consider their verdict.

And Thereafter, to-wit: at 5:52 p. m. on said 8th day of March, 1940, the same day, the jury, after due deliberation, returned into court its verdict in said cause said verdict being in writing and appearing in words and figures as follows, to-wit:

THE VERDICT

Barker Duncan, Plaintiff, vs. Guy A. Thompson, Trustee of the Missouri Pacific Railroad Co., a corp., Defendant. No. 3960.

We, the Jury, find the issues for the plaintiff and we assess his recovery at $5,691, and we further find that on such judgment the defendant is entitled to the sum of $600 principal and $91 interest, and subtracting said $691 from the said $5,691, due plaintiff, the total due plaintiff is $5,000.

(Signed) C. D. Keller, Foreman.

We, the Jury, find the issues for the defendant.

——— ———, Foreman.

[fol. 90] JUDGMENT

And Thereafter, on the same day, to-wit: the 8th day of March, 1940, and during said regular term of said court, the following judgment was entered of record in this cause:

Copy of judgment already in the hands of the Court and not reproduced here.

To which entry of judgment the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

And thereafter, during said regular term of said court and within four days after the rendition of the verdict and entry of judgment aforesaid, to-wit: on the 11th day of March, 1940, the defendant trustee filed his motion for a new trial herein as follows (File marks as follows):

Filed March 11, 1940. (Signed) Homer E. Martin, Circuit Clerk, Texas County, Missouri, By Virginia Ruth DeForest, Deputy.

IN THE CIRCUIT COURT OF TEXAS COUNTY, MISSOURI, MARCH TERM, 1940

BARKER DUNCAN, Plaintiff,

v.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, Defendant

MOTION FOR NEW TRIAL

Now comes defendant and moves the court to set aside the verdict of the jury and any judgment rendered by the court

on said judgment, and grant the defendant a new trial for the following reasons:

[fol. 91] 1. Because the trial Court erred in admitting in evidence improper, incompetent, immaterial and irrelevant testimony and evidence offered by the plaintiff over the objection and exception of the defendant, made and entered of record by the defendant at the time.

2. Because the trial Court erred in refusing to admit in evidence proper, material, relevant and competent testimony and evidence offered by the defendant, at the objection of plaintiff and over the exception of the defendant, made and entered of record at the time.

3. Because the trial Court erred in giving and reading to the jury instructions, 1, 2, 3, 4, 5 and 6 offered by the plaintiff and given by the trial Court and read to the jury by the trial Court over the objection of the defendant and over the exception of the defendant, made and entered of record at the time.

4. Because the trial Court erred in refusing to give and read to the jury proper instructions, A, B, C, D, E, F, G, H, I and J offered by the defendant over the objection and exception of the defendant made and entered of record at the time, as shown by the notes of the reporter.

5. Because the trial Court erred in refusing to give instruction "A" and to dismiss the case and withdraw said case from the jury, as prematurely brought by the plaintiff [fol. 92] because he had agreed, before filing any suit on said alleged cause of action, to repay to defendant the sum of $600 previously paid to plaintiff and not repaid to defendant at the time of filing this suit.

6. Because the trial Court erred in overruling the motion of defendant for continuance on the ground of surprise after permitting plaintiff to amend the petition, by interlination, by alleging a new and different cause of action, as to the custom of the defendant to give warning when an engine is about to be moved on the turntable.

7. Because the trial court erred in refusing to give and read to the jury instruction "B," at the conclusion of the evidence offered by the plaintiff, in the nature of a demurrer to the evidence of the plaintiff requested by de-

fendant at the conclusion of the evidence of the plaintiff, over the objection and exception of the defendant, made and entered of record by the defendant at the time.

8. Because the trial Court erred in refusing to give and read to the jury instruction "C," at the conclusion of all of the evidence, both of the plaintiff and of the defendant, in the nature of a demurrer to all of the evidence in the case, over the objection and exception of the defendant, made and entered of record at the time.

9. Because, under all the evidence in the case, the verdict of the jury should have been in favor of the defendant and not in favor of the plaintiff in any sum.

[fol. 93] 10. Because, under the evidence, the verdict of the jury should have been in favor of the defendant.

11. Because there was no evidence in the case of any actionable negligence on the part of defendant, his servants, agents or employees in whole or in part, causing or contributing to cause injury to the plaintiff.

12. Because the verdict of the jury is based on sympathy for the plaintiff and not upon any evidence in the case.

13. Because the verdict of the jury was based upon passion and prejudice against the defendant, and not upon any evidence in the case.

14. The Court erred because there is no substantial evidence to support the judgment of the Court.

(Signed) Thomas J. Cole, D. E. Blair, Hiett, Covert & Hiett, Attorneys for Defendant.

(Listing for files on back as follows:) No. 3960. Barker Duncan, Plaintiff, vs. Guy A. Thompson, Trustee, Defendant. Motion for New Trial.

MOTION FOR NEW TRIAL OVERRULED

Which Said Motion, coming on to be heard, was by the Court, on the said 11th day of March, 1940, and during said regular term of said Court overruled.

[fol. 94] To which action of the Court in overruling his said motion for new trial the defendant trustee, by his

counsel, then and there duly excepted and at the time saved his exceptions.

Thereupon, on the said 11th day of March, 1940, and during said regular term of said Court, the defendant trustee filed his affidavit for an appeal in this cause, and an appeal was allowed by the Court to the Springfield Court of Appeals, and defendant was given leave to file bill of exceptions herein at or before the next regular term of this court.

Said Affidavit for Appeal being in words and figures as follows:

Filed March 11, 1940. (Signed) Homer E. Martin, Circuit Clerk, Texas County, Missouri, By Virginia Ruth DeForest, Deputy.

In the Circuit Court of Texas County, Missouri, March Term, 1940

Barker Duncan, Plaintiff,

vs.

Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, Defendant

Affidavit for Appeal

W. L. Hiett, of lawful age, being duly sworn, upon his oath states that he is agent and attorney for the above named defendant in the above entitled cause, and that he makes this affidavit for, and in behalf of, said defendant. [fol. 95] Affiant further states that the appeal of said appellant taken in this cause is not made for the purpose of vexation or delay but because this affiant believes that said appellant is aggrieved by the judgment and decision of the Court herein.

(Signed) W. L. Hiett, Agent and Attorney for Defendant.

State of Missouri,
County of Texas, ss:

W. L. Hiett, of lawful age, being duly sworn, upon his oath states that he is the agent and attorney of the defend-

ant in the above entitled cause, and that the facts stated in the foregoing affidavit are true.

(Signed) W. L. Hiett.

Subscribed and sworn to before me this 11th day of March, 1940. (Signed) Homer E. Martin, Clerk of the Circuit Court, by Virginia Ruth DeForest, Deputy. (Seal.)

(Listing for files on the back as follows:) No. 3960. Barker Duncan, Plaintiff, vs. Guy A. Thompson, Trustee, Defendart. Affidavit For Appeal.

Thereupon the plaintiff, by his counsel, in open court prayed the Court to make the following record entry in said cause on the Judge's docket, which was accordingly done, to-wit:

[fol. 96] RECORD ENTRY

"Before appeal was granted plaintiff offered to allow the motion for new trial to be sustained, which was by the Court refused."

And Thereafter, within the time so allowed by the Court for the defendant trustee to file herein his bill of exceptions, to-wit: on the — day of ——, 1940, being the — day of the regular ——, 1940, term of said court, the Court, by an order of record in term time, extended the time for filing bill of exceptions herein, said order being in words and figures as follows, to-wit:

ORDER SETTLING BILL OF EXCEPTIONS

And Now, here, on this 24 day of June, 1940, and within the time so allowed (and extended) by the Court for filing bill of exceptions herein, the defendant trustee presents this, his bill of exceptions, and prays the Court that the same may be examined, allowed, signed, ordered filed, filed, and made a part of the record in this cause, which is accordingly done.

William E. Barton, Judge of the Texas County Circuit Court, State of Missouri.

I hereby approve the foregoing as the bill of exceptions in the above entitled cause this 18 day of June, 1940.

John P. Moberly and Sizer & Myres, Attorneys for Plaintiff.

[fol. 97] I hereby approve the foregoing as the bill of exceptions in the above entitled cause this 4th day of May, 1940.

David E. Blair, Attorney for Defendant.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 98-103] Reporter's Certificate to foregoing transcript omitted in printing.

We certify that the above and foregoing is a true copy of the bill of exceptions, with the evidence in narrative form, with the omissions noted from time to time therein, with an Index hereto appended by the printer.

Thos. J. Cole, Hiett, Covert & Hiett, David E. Blair, Attorneys for Appellant.

[fol. 104] In the Springfield Court of Appeals—October Term, 1940

Barker Duncan, Respondent,

vs.

Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of Texas County, Missouri

Honorable William E. Barton, Judge

Respondent's Supplemental Abstract—Filed September 23, 1940

Direct examination.

By Mr. Myres of Joe Smith:

"Q. Now, how is this locomotive run—turned, when it gets up on the table?

A. Well, they have an electric motor that is operated.

Q. And where is that located?

A. Well, it is located on one end of the table.

[fol. 105] Q. And how is it run, by gas or electricity or some other motive power?

A. Electricity.

Q. What size is the motor?

A. Well, I couldn't say but it is a large motor, a very large motor.

Q. Now, have you operated that motor yourself?

A. Yes, sir.

Q. How did it operate, the day before April 10, 1936, and the morning after this boy was hurt? Did you operate it then?

A. Yes, sir.

Q. How did it operate then? Just tell the jury.

A. Well, when you got in the cab there was a lever that you moved it one way and that is the way it turns and then you push this lever over and that is the way—whichever way you want it to turn you move this lever and when you throw the lever in motion it started with a jerk and then after it caught hold, why, it continued smooth.

Q. Now, you say it caught with a jerk; about how much would the table and engine be moved, say, an ordinary engine, this 1424, here, how much was the table moved when it jerked?

A. Well, it would move at least six inches with a jerk (indicating).

Q. Now, when it did move like that could you start it so it would go smooth off or not?

A. No.

Q. Is that the way it operated, with a jerk, as long as you were there?

A. No, not all the time, it was at that particular time be-[fol. 106] cause—well, it always had that little jerk there; of course, it could be operated after it started it would run off smooth, you understand, it didn't jerk all the way around. When you would first start it off, why, it had that jerk."

(Bill of Exceptions pp. 20-21.)

"Mr. Myres: What warning, if there was any warning given, what warning was it with reference to the turning of the turn-table with the engine on it?

A. Well, we was either told that was generally the way: that somebody told us or we watched and we had somebody to show us by a motion and holler and tell us."

(Bill of Exceptions p. 23.)

Direct examination.

By Mr. Myres of Barker Duncan:

"Q. And when did you start to work for the Missouri Pacific at Nevada?

A. July 1st, 1934.

Q. And was that service continuous up to the time you were injured?

A. Yes, sir.

Q. In what capacity were you employed?

A. As a round house or shop laborer.

Q. Now, what were your duties, general duties, in that capacity?

A. Mr. Myres, do you mean the job, the particular job that I was working on at the time of the injury?

Q. Yes, at the time of your injury, what were you doing?

A. I was supplying engines.

[fol. 107] Q. By supplying engines what do you mean?

A. I mean that by supplying engines you have got to see that the proper flagging material is on the engines, which consists of torpedoes and red light fusees and flags and also to see that there is a pan hoe on there for cleaning the cinders from the pans, clinker hooks for stirring the fire and filling the lubricator with oil.

Q. Now, what shift were you working on at the time this accident happened?

A. If I am not mistaken, it was from 9 o'clock till 6:00, 9:00 p. m. till 6:00 a. m.

Q. Now, you spoke of supplying an engine; is that the same as servicing it and getting it ready for another run?

A. Yes, sir.

Q. Did you check everything about the engine so that it is ready to go out on duty, is that what you mean by supplying it?

A. Yes, sir.

Q. All right. Now, when did you go to work the night this accident happened?

A. If I remember right, it was 9:00 p. m. April 9th.

Mr. Blair: 1936.

Mr. Myres: And the accident happened at what time of day on the 10th?

A. Oh, about 1:30 a. m. the 10th.

Mr. Blair: What year.

A. The night of the 10th. Sir?

Mr. Blair: What year?

Mr. Myres: What year?

A. 1936.

[fol. 108] Q. Now, there has been an engine here—picture of an engine—picture of an engine here, marked Plaintiff's Exhibit A. I will ask you to look at that and see if you recognize it?

A. Well, that looks like the engine, 1429, to me.

Q. Is that the engine upon which you were stationed the night you were injured?

A. Yes, sir.

Q. Now, is that the engine that made the run from Joplin to Nevada on the night of April 10th?

A. Yes, sir.

Q. And was that engine being turned around to start back on its return run, the one you were injured on, this one, 1429?

A. Yes, it was to be turned and sent back on the opposite run.

Q. That is the engine marked Plaintiff's Exhibit A. When was this engine run in on the round table, if it was?

A. Put on the table around 1:20 a. m."

(Bill of Exceptions pp. 37-38.)

"Q. Now, I want you to tell the jury, looking here at Plaintiff's Exhibit B, I want you to take that picture, Plaintiff's Exhibit B, and see if the lubricator is shown on that exhibit?

A. Well, they have just about got it blotted out, it looks like, from the ink.

Q. Well, where the ink is, is where the lubricator is, is it?

A. Yes, sir.

Q. All right. Now, I want you to look at that picture and tell this jury the exact position that you got in when [fol. 109] you started to fill the lubricator.

A. When I started to fill the lubricator I got up—these gentlemen has already seen this picture, haven't they?

Q. Yes, sir, they have seen it.

A. I got up with my right foot on the rail of the turn-table.

Q. Now, by the right rail of the turn-table I want you now—I want you to look—make an X about where you put your foot on each rail.

A. (Witness marks exhibit.)

Q. Now, make a "1" out there because the first X, we didn't designate it, "X-1."

A. (Witness marks exhibit.)

Q. All right. Now, that's all right. Now, you have made X-1 on Plaintiff's Exhibit B where you had which foot?

A. The right foot.

Q. The right foot. Now, which way would you be facing, then, with your right?

A. I would be facing north.

Q. Be facing north?

A. Yes, sir.

Q. That would be in the same general direction that the engine was headed?

A. Yes, sir.

Q. Is that right?

A. That's right.

Q. Now, where was your left foot?

A. On the steam chest or jacket of the cylinder, rather.

Q. Now, will you put an X, mark it "X-2," just approximately where you put your left foot.

A. (Witness marks exhibit.)

Q. Did you mark it "2"?

A. Uh-huh.

Q. Now, let's see if you can see this. All right. Now, just take your seat there. Now, with your right foot—with [fol. 110] your right foot on the rail and your left foot on the lubricator of the engine, is that right?

A. No, not on the lubricator.

Q. Well, I mean not on the lubricator but on what?

A. On the chest or the jacket that goes around the cylinder.

Q. All right. And then you had your can in your hand, did you?

A. Yes, sir.

Q. And what did you do with the can?

A. I reached up and inserted the snout into the lubricator.

Q. Well, now, what kind of a spout was that, you call it snout, or the spout, you mean?

A. Well, all right, spout.

Q. Well, spout.

A. Well, the spout on this can is probably eight or nine inches long, I don't know, it could be a little bit longer or could be a little shorter but anyway there is a spout several inches long.

Q. Where did you insert that?

A. In the hole in the top of the lubricator.

Q. Now, I will ask you this: at that time was the turntable and the engine upon the turntable, was it being moved in any direction?

A. No, sir.

Q. Had there been any movement of the turntable or the engine in any way?

A. No, sir.

Q. Well, now, did you receive any warning that there was going to be a movement of the turn-table?

[fol. 111] Mr. Blair: I object to that as wholly immaterial to the issues in this case because not pleaded in the original petition.

The Court: Objection overruled.

To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

Mr. Myres: At that time, now, when you were there filling the lubricator, did you get any warning that the table was going to be moved?

A. When I was filling the lubricator?

Q. Yes.

A. No. After I put the oil can in the lubricator and was down on the platform, then we got warning that they was going to turn the table.

Q. Who gave you the warning?

A. Mr. Everett.

Q. He was the foreman?

A. Yes, sir.

Q. Now, how long did you work around this particular engine and other engines on this turn-table, there, service them as you have described?

A. For several months.

Q. During that time were you always given warning, was it the custom to give you warning when there was going to be a movement of the turn table?

Mr. Blair: We object to any introduction of any evidence about custom because it is not pleaded in the original petition.

A. Yes, sir.

[fol. 112] The Court: Objection overruled.

To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

Mr. Myres: What was that custom that you had, there?

A. The custom was that they would tell you they were going to move the table.

Mr. Blair: The same objection, and ask that it be stricken out.

The Court: Same ruling.

To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

Mr. Myres: How was the warning given?

A. They would holler at you, say, 'Get out of the way, were are going to move the table,' or, 'Get in the clear.'

Q. And where would that warning come from?

A. From any man that was going to move the table.

Q. And about how far would he be from the engine; how far would he be from the engine or the place where you were, there that night when he gave the warning?

A. Well, he couldn't be very far from you if he was at either end of the table. That night, how far was he from me when he gave me warning, you mean?

Q. Yes, how far was Everett from you?

A. Oh, not over ten feet, I will say.

[fol. 113] Q. Now, when you received the warning that the table was going to be turned what did you do?

A. I stood there on the platform until the table was turned.

Q. Did you move around or walk anywhere?

A. Oh, no, no.

Q. What did the other men do?

A. They stood there.

Q. Now, which way was the table turned?

A. It was turned from the north around to the west, to the southwest until it was headed what we call south.

Q. In other words, the engine, the position of it, was completely reversed, is that right?

A. Yes, sir.

Q. Instead of it being headed north it was headed south?

A. That's right.

Q. Now, did the turn-table stop?

A. It did.

Q. Did it come to a complete stop?

A. Yes, sir.

Q. And after it came to a stop where were you when it came to a stop?

A. Still standing on the platform beside the lubricator on this engine end and on the platform by the side of the engine.

Q. Now, what did you do? After the turntable was brought to a complete stop what did you do?

A. I walked to the front end of the engine.

Q. Now, before you go further, about how much distance is that?

A. That is probably 12 feet, I will say, could be a little further.

[fol. 114] Q. And then what did you do?

A. Approximately 12 feet. I got up on the pilot of the engine.

Q. Now, wait just a minute. By pilot you mean what?

A. Well, that is what they generally term the 'cow-catcher' but it is——

Mr. Blair: Front of the engine?

A. Front end of the engine, yes, sir.

Mr. Myres: Are there steps up there?

A. There is a step at the bottom and further up there is an inlet on most of them. That is a step, yes, there, used for that purpose.

Q. Now, did you go up on those steps?

A. Yes, sir.

Q. And did you hurry or what speed did you take from the time you left the point, now, where the lubricator was and started to the front of the engine to climb up, how were you moving, ordinary gait or how?

A. I was moving at an ordinary gait, you can't move too fast on these locomotives.

Q. What did you do when you got to the front of the engine?

A. I got up on the pilot and walked up the step, up the running board and back to the lubricator.

Q. Now, about how long would you say that you were from the time that you left where you were standing down here by the lubricator and started to the front part of the engine, how long a time elapsed until you got up on the running board and back here to the lubricator to take your [fol. 115] can out of the place where you put it in?

A. Oh, it wasn't a great length of time, probably a couple of minutes, I guess.

Q. A couple of minutes. Now, during that time did any employee of the railroad give you any warning that the engine was going to be moved again?

* * * * * * *

Mr. Myres: Did you know that the engine was going to be moved again?

A. No, sir.

* * * * * * *

Mr. Myres: Now, when you got up on the running board above your can which was in the lubricator what position did you get into there?

A. Got in a stooped position to take the can out of the lubricator.

Q. And what happened?

A. The turn-table gave a sudden jerk and got me overbalanced and into the pit I went.

Q. Which way was the turn-table moved, if it was moved?

A. It was moved east.

Q. The direction it had been going?

A. Well, if you would take it on around, yes.

Q. That's what I mean.

A. Yes, sir.

Q. The same direction?

A. Yes, sir.

Q. How much was the turn-table moved?

A. It couldn't have been less than four or five inches.

Q. Now, how did that happen?

* * * * * * *

[fol. 116] Mr. Myres: Will you just describe, in your own language, as to how sudden or how quick or the time elapsed after you got in a stooped position until it was moved?

A. I had just got down to get hold—now, you understand, Mr. Myres, that is a difficult question for this reason: I was injured right then and there and naturally it——

* * * * * * *

Mr. Myres: Go ahead; answer the question as quickly as you can.

A. As to the length of time, it wasn't long; it wasn't long, it couldn't have been long because you don't stoop down in a stooped position to do your work that—that kind of work, to merely take a can from the lubricator and bring it back up, it would'n't take very long to do it.

Q. Now, while you were in the act of doing that, is that when the round table was suddenly moved?

A. Yes, sir."

(Bill of Exceptions pp. 42-50, inclusive.)

"Q. And about how far from the running board where you were—how far is it down to the bottom of that pit where you fell there that day, approximately?

A. Well, between 15 and 20 feet, I'll say.

Q. Now, how did you land?

A. I lit on my right foot, mostly on my right foot.

Q. Did you receive any injuries?

A. Yes, sir.

[fol. 117] Q. What kind of injuries did you receive?

A. I wouldn't know the name of them but anyway the foot was broke and the ankle joint and the heel was mashed up into the foot and busted and my knee was—caused an injury to my knee to this extent: that you can't walk good with it, and also into the hip and the small of the back."

(Bill of Exceptions p. 51.)

BARKER DUNCAN, Plaintiff:

Direct examination.

By Mr. Myres:

I was picked up out of the pit and taken to the round-house and laid on a cot. From there I was taken in an

ambulance to the Missouri Pacific's doctor, at East Cherry Street, in Nevada. His name was Dr. Ray. I was taken to and from the doctor's office in an ambulance during which time I was suffering intensely. My leg and back were hurting so that the doctor gave me a hypodermic. This pain has never quit. I was taken from my home to the Missouri Pacific depot for a train to St. Louis. Before I left the doctor's office, he put my foot in a steel basket of cotton. There was swelling in the region of my foot. My limb was also swollen all the way up to my hip. From the depot in Nevada I went to St. Louis, Missouri, to the Missouri Pacific hospital. I stayed in the Missouri Pacific hospital four or five weeks, probably six weeks. Upon my arrival there they took me to the operating room and gave me an anes- [fol. 118] thetic, and when I came out of the operating room they had pins through my legs and through my foot, and a cast up to my knee, with a big bunch of iron or weight on the bottom. During all this time I suffered pain. There was a constant pull on my injured leg and foot. During the time that I was in the hospital, I was in bed part of the time and in a wheel chair part of the time. At the end of six weeks I went to my home in Nevada, where I stayed a few days, and then returned back to the Missouri Pacific hospital at St. Louis. On my second trip I stayed several weeks again at the hospital. From April 10, 1936, up to February, 1937, when I was operated on again, I was in the hospital every month. I had to report every thirty days. I was requested to do this by my doctor. In February, 1937, I went back to the hospital in St. Louis for an operation on my foot, at which time they operated on it. They cut the foot open around the joint, and went in, so I was told, and chiseled off the joints or smoothed them down and put it in a more working condition. They operated around the right ankle joint. I have a scar now about six inches long where this operation was performed. I stayed in the hospital approximately six weeks at this time. I continued to report to the hospital once a month, and stayed there on different occasions. I was on crutches the greater part of two years. I can walk now a short distance without a cane, [fol. 119] but if I walk any length of time without a cane, the weight is too great and the pain is too intense. My foot goes to swelling and I can't make it. I just have to get off of my foot. My foot now swells up when I walk a quarter of a mile. I couldn't walk on my foot for over an hour

or an hour and a half. I have tried to work dressing poultry and picking chickens at the North Main Street Produce, at Joplin, Missouri. I worked there about three months the first time, and I could not continue to do that work, because the job required a man able to carry 100 pound sacks of feed and loading and unloading customers, and I couldn't do it. I tried to do it, but I couldn't make it. I have tried to do other kinds of work, but I have been unsuccessful. When I was in St. Louis I received a call from the claim department. This department has a staff of attorneys and claim agents there in St. Louis. When I went to the claim department I saw Mr. Salter (Bill of Exceptions pp. 51-58, inclusive).

(Testimony of Barker Duncan shown haec verba, Appellant's Abstract, pp. 20-21.)

(Witness handed Exhibit "D.")

I signed this instrument. When the instrument was first put before me I refused to sign it because I asked him (Mr. Salter): "What is this? Is this a release that you are asking me to sign?" He said, "No, sir, it is not a release, it is a formality that we have when we advance a person money on their claim." I said, "Well, this states that you can't [fol. 129] bring suit," and Mr. Salter said, "Now, Mr. Duncan," he said, "we are going to take care of you; as far as any suit is concerned, that is not necessary because we are going to see that you are well imbursed for your injuries." If he had not made that statement to me and the further statement that my claim was under the Missouri Workmen's Compensation Act, I would not have signed the instrument marked Plaintiff's Exhibit "D." No one else signed this statement on behalf of the Missouri Pacific Railway Company, either at the time I signed it, or at any other time. No official of the Missouri Pacific Railroad Company signed this statement. I was the only one that signed it.

(Witness was handed Plaintiff's Exhibit "E," which was a check for $600.)

This is a check which Mr. Salter gave me. After I signed this instrument marked Exhibit "D" he gave me the $600 draft, marked Exhibit "E." He gave me the draft after I had signed Exhibit "D." After I signed this instrument

and received the $600 draft, and cashed it, the Missouri Pacific Railroad Company hasn't, at any time after that, made any effort to settle my case. The Missouri Pacific Railroad Company has refused to negotiate a settlement with me. I received the $600, and have offered to pay back no part of it. After signing these two instruments, I have received no further offers of settlement. At the time the turn table was suddenly moved, there was no outside in-[fol. 121] dividual other than the employees of the Missouri Pacific Railroad present or in and around the table. Mr. DeGood moved the table the first time. Prior to my injuries I was always able to perform my duties as a railroad brakeman. I have never had any other physical injuries except a slight burn. I settled that and continued right on in my employment. I had no disability from this injury. Since this accident on April 10, 1936, I have been unable to do a day's labor, like braking. I cannot brake now on any railroad, either the Missouri Pacific or Frisco. I only have a grade education, and a small amount of business college (Bill of Exceptions pp. 60-65, inclusive).

Cross-examination.

By Mr. Blair:

Messrs. Wilhelmson, Everett Clark, foreman, Hicks, who was in charge of the engine, and DeGood, were all of the men present at the time, besides myself. I was taking the snout of the lubricator out, which was below where I was standing on the platform at the time I fell in the pit. It was approximately two or three inches below the running board. I was standing as shown in Plaintiff's Exhibit "B" on the platform in a stooping position, and reaching down and removing the can from the hole in the forced lubricator of the engine. There was no forward or backward movement of the engine that I know of. When the turn-table moves it moves the engine, and it cannot be moved unless [fol. 122] the motor is applied to it. I am familiar with the motor, and have operated the same. When the lubricator is in an upright position, the motor and turn-table and engine is stationary. When the lever is moved to the right or left, it moves the turn-table or the track on which the turn-table is placed. During all of the time I worked in this roundhouse. I am not an electrician, and do not know anything about motors. The electricity had to be applied

before this motor would move. The electricity was applied by the lever, and it could not possibly be moved without somebody had hold of that lever. From July, 1934, to April 10, 1936, I never knew of any movement unless somebody was in there and had hold of that lever, and in order for the engine and the track and the turn-table to move, somebody had to have hold of that lever. I have never seen it moved unless somebody had hold of it.

(Witness handed a statement.)

That looks like my signature. I never read it over before I signed it, and the statement was taken in the hospital. I did not state in there that I didn't know whether the engine was moved before or at the time I fell. I did not make that statement. The statement was not read over to me. Mr. Short took the statement. Short is a claim agent of the Missouri Pacific. I don't know who was the first one to me when I fell in the pit. I saw J. G. DeGood there. I did not [fol. 123] tell DeGood that I didn't know about the track being moved. It is not the truth that I simply lost my balance and fell. That is not a fact. I don't know of anybody that saw me on the engine. Some employee of the railroad was in there and operated the electric motor which turned the table at that time. The employees operated the motor, and some employee had to move it. I wasn't working in the cab, or motor cab. I was filling the lubricator. I was standing with one foot on this rod and the other on the steam chest when the engine was in a northwestern direction. This was about four feet above the platform. When I was in this position I inserted the spout of the oil can in the lubricator. The engine was turned around to the opposite direction, but I was not up there in that position at the time it was moved. Mr. Everett did not tell me that I was in a dangerous position. The platform of the turn-table was approximately twelve feet from the bottom of the concrete pit where I fell. The lubricator was approximately eight feet above the platform. I couldn't reach it without standing on something. I have put oil in the lubricator on numerous times on this very engine, No. 1429. It was regularly used, and I have serviced it. This engine had been frequently in the shop, and on this turn-table from July 1, 1934, to April 10, 1936. I had worked on this very same engine. Before the engine was turned from its north- [fol. 124] eastern direction, there were lights on the round-

house. When it was turned around, I had my flashlight and I could see this can in the lubricator by the use of my flashlight. I had no trouble in seeing the can. I don't know of anyone of my own knowledge that knew that I was on the platform in a stooping position. As I fell I grabbed the rail, and I fell head first. When I grabbed the rail it turned me over and I landed on my feet. My right foot struck first. I received the $600 draft, marked Plaintiff's Exhibit "E," and I have never re-paid any part of it. I had not re-paid any part of it before this suit was commenced. I read Exhibit "D" over before I signed it, and was furnished a copy of it. I carried a copy away with me when the draft was given me, marked Exhibit "E." The draft bears date of August 13, 1937, which was something like sixteen months after I was injured. I carried the draft around about a month before I cashed it. I cashed it on the 15th day of September. That is the day that I buried my wife, and paid the funeral bill. This draft, marked Exhibit "E" paid the funeral bill of my wife. I was in the hospital all the time, too. I don't remember making any such answer. I don't remember of Mr. Everett stating to me that while I was on the rail it would be a long ways to fall. That is part of the deposition taken on the 26th day of October, 1938. I gave my deposition at that time. That deposition has been on file ever since. This could have [fol. 125] occurred, but I don't remember it (Bill of Exceptions pp. 65-76, inclusive).

Cross-examination.

By Mr. Blair of Barker Duncan:

"Q. You were standing on that rail with one foot on the rail and the other foot on the steam chest when it was suggested it was a long ways down to the——

A. (Interrupting.) He gave me warning that the table was going to turn after I was down on the platform of that engine—of that turn-table.

Q. They weren't turning the turn-table at that time, were they?

A. No, sir.

Q. That was before they turned the turn-table?

A. That I was down on the platform when he gave me the warning?"

(Bill of Exceptions p. 76.)

I had one foot on the rail and the other on the steam chest before they turned the table. I don't remember that it was suggested to me that it was a long ways to the bottom of the pit. I didn't sign the deposition, as it was waived. This wouldn't make any difference to me that I didn't sign it. At that time when my deposition was taken I didn't know whether my case was under the Workmen's Compensation Act of Missouri, or under the Federal Employers' Liability Act. I had heard of the Workmen's Compensation Law of Missouri. At that time I had no application [fol. 126] before the Missouri Workmen's Compensation Commission. I never filed suit until I found out definitely that they would not even try to negotiate settlement. The action before the Missouri Workmen's Compensation Commission was filed before I started this case.

(Witness shown Plaintiff's Exhibit "D.")

That is my signature. I read it over before I signed it. I was forty-seven years old at that time, and I can read and write the English language.

(Witness was handed Defendant's Exhibit 2.)

That is my signature.

(Witness was handed Defendant's Exhibit 3.)

This looks like my signature. I did not receive a copy of defendant's Exhibit 5 that I know of. The $600 is all they have offered me. It is not true that some person on behalf of the Missouri Pacific Railroad Company has offered to settle this case with me in addition to the $600 on the basis of half time. This is not true. I don't know whether I am on the Frisco seniority list or not. I couldn't have gone back to work for the Frisco. I still hold my seniority rights with the Frisco (Bill of Exceptions pp. 76-81, inclusive).

(Redirect examination by Mr. Myres of Barker Duncan.)

"Q. You were shown this Exhibit 1 while your deposition was being taken in Joplin, were you not?

A. Yes, sir.

[fol. 127] Q. With the ladder up the side of the lubricater, the oil lubricater, is that correct?

A. Yes, sir.

Q. Did you ever use a ladder in filling that oil lubricator while you were working for the Missouri Pacific Railroad Company, the two years or more you were there?

A. No, sir.

Q. Did you ever see anybody else use one?

A. No, sir.

Q. Is it possible to use one in the filling of that lubricator, there?

A. No, sir.

Q. Why?

A. Because there is no room for a ladder there to work in safety up at the side of that engine.

Q. Now, if the ladder slips, what happens to the ladder, if it slips at the bottom, sticking almost parallel up—what happens to the end of it, where does it go to?

A. It would go right out under the rail and down into the turn-table pit.

Q. Is there anything there on that platform to keep that ladder from slipping off of the platform into the pit?

A. Not that I know of.

Q. Now, during the two years and a half that you were there, filling these lubricators, Mr. Duncan, I will ask you to state if you ever saw a ladder around the turn-table that was being used?

A. No, sir.

Q. All the time that you worked there who was your other foreman, other than Mark Everett?

A. Well, I worked days a while, under Mr. Glenn and Mr. Diedrich, and Mr. Thomas and Mr. Everett, I believe that [fol. 128] will take them all in. I don't remember any more.

Q. During all the time that you worked there and you filled the lubricators did you fill them—put the oil can in like you did there on the morning of April 10, 1936, the same way you always did it?

A. Yes, sir.

Q. And did you take it out the same way?

A. Yes, sir.

Q. And has this foreman seen you do it?

A. Yes, sir.

Q. Time and time again?

A. Yes, sir.

Q. Did any of them ever tell you to do it any other way or order you to do it any other way?

A. No, sir."

(Bill of Exceptions pp. 82-83.)

"The Court: Is that all you want with this man? Well, who next?

Mr. Myres: Well, we have got some preliminary work. I want to introduce these exhibits of ours, your Honor, and I want to read some of them to the jury.

The Court: Go ahead.

Mr. Myres: At this time, your Honor, I want to—come up here, Judge.

Whereupon the following proceedings were had up at the bench, before the Court:

ADMISSION AS TO CERTAIN FACTS

Mr. Blair: The defendant admits, as I agreed with Mr. Myres that I would do, that this engine had pulled freight [fol. 129] train No. 264 from Joplin, Missouri, to Nevada, Missouri, on that same day and was being serviced to pull Train No. 263 from Nevada to Joplin the same day. Each of the trains contained cars and merchandise travelling from and to points outside of Missouri. I will make that as an admission."

(Bill of Exceptions p. 88.)

The deposition of Dr. W. E. Craig of Joplin, Missouri, was read on behalf of the plaintiff. No attempt has been made by the appellant to abstract any of this witness' testimony. The testimony is shown in the Bill of Exceptions from 94-127, inclusive.

DR. L. M. DILLMAN was called as a witness for plaintiff, and his testimony is shown in the Bill of Exceptions, 127-146 inclusive. No attempt has been made by the appellant to abstract the testimony of Dr. Dillman.

(Direct examination by Mr. Blair of Edward Wilhelmson.)

"Q. State whether or not in your opinion it was moved at that time.

* * * * * * *

A. I don't believe it was."

(Bill of Exceptions p. 180.)

(Cross-examination by Mr. Myres of Edward Wilhelmson.)

"Q. You are not sure?

A. Well, I am not positive of nothing.

[fol. 130] Q. Now, you say if you are standing up and it is moved you can feel it, can't you?

A. Yes, sir.

Q. Jerks you, doesn't it?

A. Oh, there is no jerk to it; it is a motor, 30 horsepower motor that handles that table and there is no jerk to it but any little movement of the table you should feel it.

Q. Yes, sir.

A. Any little movement.

Q. And, if you are standing some place, say, on a running board you would feel it quite a bit there, wouldn't you?

A. Well, you should feel it.

Q. Yes, more than you would inside if you was putting in coal, wouldn't you, huh?

A. Well, I wasn't shovelling coal in, she has got a stoker on her.

Q. Well, you have to be handling that stoker automatically, don't you?

A. Well, it just handles with the valve.

Q. Well that is what I mean. You have to be pushing a valve?

A. No, just turn the valve on.

Q. You were doing that?

A. Yes, sir.

Q. You didn't see him fall?

A. No, sir.

Q. You don't know where he was when he fell?

A. No, sir.

Q. That's all. Stand aside."

(Bill of Exceptions pp. 180-181.)

(Recross-examination by Mr. Myres of Grant Hicks.)

"Q. There wasn't any outsiders there around the turntable where you were working on this engine?

A. You mean unemployed?

[fol. 131] Q. That's right.

A. No, sir, not that I know of.

Q. And you didn't see anybody there?

A. No, sir.

Q. If that turn-table—when it was turned it had to be turned by an employee of the Missouri Pacific Railroad Company?

A. There would have to be someone turn it, it won't move by itself.

Q. Well, there wasn't anybody there to turn it except the Missouri Pacific employees, was there?

A. Not that I seen, no.

Q. That's all. Stand aside."

(Bill of Exceptions p. 210.)

(Cross-examination by Mr. Myres of B. F. Hull.)

"Q. How long have you been employed by the Missouri Pacific?

A. Since September, along in September, 1923, the last time.

Q. How many years' experience have you had in railroading?

A. Thirty-one years.

Q. Now, sometimes they had some trouble lining that engine up or that track up, didn't they?

A. Well, I don't see why?

Q. Huh?

A. I don't see why.

Q. Well, didn't they? There is a line there they had to go by, wasn't there?

A. Yes, sir.

Q. And didn't they, in stopping that, could they stop it directly to the fractional part of an inch each time so that frog would go in there?

A. They could keep it coming till they got to a point. Of [fol. 132] course, if he left the juice on too long it would go by.

Q. Yes. Well, by the lever, did you ever use that lever, there?

A. Yes, sir.

Q. Why, don't you know, Mr. Hull, that the man that operated that thing, that he threw the juice on and that table started to turn around there, that if he stopped it a little over the line, why, he would have to move it back that way?

A. Yes, sir.

Q. He did that often, didn't he?

A. Wh es.
Q. Why ure.
A. Anybody did.
Q. Sometimes it would go over an in. or two and then he would have to move that back so he could go around here and put the frog in, didn't he?
A. Yes.
Q. And after the turn-table was stopped then if the motor was back here he would have to come across here and look at it and then he would go back to his motor and then get it on the line, try to get it on the line, wouldn't he?
A. Yes, but he had a man on the other end to signal him or he would go look down the rail and he could see. I have lined it up from the wrong end, from one end of the table you line it up.
Q. They didn't move it while men were working on that engine, either, did they?
A. Why, no, we didn't move the engine.
[fol. 133] Q. No. Nor they didn't move that turn-table while men were up on the engine working on it, either, did they, without giving them warning?
A. Why, no, they give them warning.
Q. Yes, that's all."

(Bill of Exceptions pp. 213-214.)

(Cross-examination by Mr. Myres of O. L. Salter.)

"Mr. Myres: Did any official sign it for the Missouri Pacific Railroad Company?

Mr. Blair: We object to that because it shows for itself.
The Court: Objection overruled.
To which ruling of the Court the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

A. Well, I signed it as a witness. It was my understanding I was signing as the representative of them, although I don't exactly understand your question. My name appears as a witness. Restate that and I will try to be more specific.
Mr. Myres: Your name appears over here as a witness, doesn't it?
A. That's right, Mr. Myres.
Q. And Mr. Wolfe's name appears as a witness?
A. Yes.

Q. And that is the only official that signed it, of the Missouri Pacific Railroad?

A. That's right, there was no official present at the time [fols. 134-136] except myself, and I am really a claim agent, I guess you would call it a semi-official position.

Q. And this is the original?

A. That's right.

Q. That's all."

(Bill of Exceptions p. 224.)

Sizer & Myres, Monett, Missouri, John Moberly, Houston, Missouri, Attorneys for Respondent.

[fol. 137] In Springfield Court of Appeals

[Title omitted]

Respondent's Motion to Dismiss the Appeal, Suggestions in Support of Said Motion, Statement and Brief—Filed September 28, 1940

Respondent's Motion to Dismiss Appellant's Appeal.

Comes now Barker Duncan, respondent in the above-entitled cause, and moves the court to dismiss the appeal [fol. 138] herein taken by the appellant, Guy A. Thompson, trustee of the Missouri Pacific Railroad Company, a corporation, for the reason that appellant has not filed in this court a printed abstract of the entire record in this cause, and has not included in the purported abstract of the record, which he has filed, so much of the record, including the bill of exceptions, as is necessary to a complete understanding of all the questions presented for decision, as required by the provisions of Section 1028, Revised Statutes of Missouri, 1929, and Rules 11, 12, 13, 14, and 15 of this court.

In support of said motion respondent shows to the court that, as shown by the bill of exceptions signed by the trial judge, Wm. E. Barton, on June 24, 1940, and filed by the clerk of the Circuit Court of Texas County on the 24th day of June, 1940, the appellant has entirely omitted from his abstract of the record testimony of certain witnesses hereinafter referred to, and has failed to reduce to narrative

form the testimony of other witnesses, as hereinafter referred to; that the abstract, as filed by the appellant, does not give the substance of the testimony of the various witnesses so that the issues raised upon this appeal can be reviewed by the court.

Respondent shows to the court that the testimony of Dr. W. E. Craig has been completely omitted, and no attempt made whatsoever to reduce the testimony of this witness [fol. 139] to narrative form, or to print in substance any of the testimony of said witness. This testimony is important to show that plaintiff was a permanent cripple and unable to earn any sum to repay the money borrowed from appellant. This evidence further shows that appellant knew at the time the money was loaned the plaintiff could not repay the same.

Respondent shows to the court that the appellant has failed to abstract in narrative form or any other form the testimony of one Dr. L. M. Dillman, who testified for the plaintiff. No attempt is made by the appellant to give the substance of the testimony of said witness or to print the same as shown in the bill of exceptions. This testimony is necessary for same reason as Dr. Craig's.

Respondent further shows to the court that the appellant has failed to abstract the testimony of witness, Joe Smith; that a substantial part of the testimony of this witness has been completely omitted from the appellant's abstract, and no attempt has been made to reduce important parts to narrative form or to print the same in question and answer form as shown in the bill of exceptions. Respondent further shows that the testimony of this witness covers pages 12 to 31, inclusive, of the bill of exceptions; that the appellant's attempted abstract of this witness' testimony only gives about a page and a half in narrative form, completely ignoring important features of his testimony; that the respondent was forced to file a supplemental abstract [fol. 140] of this witness' testimony in order that this court might have before it the evidence of this witness.

Respondent further shows this court that the plaintiff's testimony, Barker Duncan, as abstracted by the appellant in narrative form, is shown in the appellant's abstract pages 17 to 23, inclusive, covering only six pages. The testimony given by this witness is shown in the bill of exceptions, covering fifty-six folios, from pages 32 to 88, inclusive. The respondent has had to abstract the testimony

of this witness, as shown by the respondent's supplemental abstract pages 3 to 25, inclusive. No attempt has been made by the appellant to abstract great portions of this witness' testimony, and much of the important testimony of this witness has been ignored by the appellant in the attempted abstract, as filed in this court.

Under the rules of this court the respondent has been forced to file his supplemental abstract in order that the issues can properly be reviewed by this court. The respondent earnestly contends that the abstract as filed by the appellant herein does not conform to the rules of this court or Section 1028, Revised Statutes of Missouri, 1929; that important testimony of the witnesses, Joe Smith and Barker Duncan, has been omitted from the appellant's abstract, which tended to show that the turntable, when started, moved suddenly and with a jerk, and that the [fol. 141] movement of the turntable was some four to six inches. The further testimony of these witnesses is omitted which tended to prove that there had been a long-established custom for the employees of the railroad to warn men working upon the engine before moving the same. The appellant has omitted the testimony of these witnesses which gave a correct description of the operation of the turntable at the time the accident happened, and also the working mechanism of the turntable. The appellant has failed to abstract the further testimony of these witnesses relative to the movement of the turntable by the railroad employees, and that no other person moved the turntable except the employees of the appellant.

Respondent further shows that the appellant failed to properly abstract the testimony of Edward Wilhelmson; that the testimony omitted of this witness tended to show that when the turntable was moved, it started by jerks sufficient to cause the plaintiff to fall from the running board of the engine where he was filling the lubricator. The appellant failed to abstract parts of the above witness' testimony which tended to show that no one other than the Missouri Pacific employees moved the turntable.

The respondent shows that the testimony of one Hull was not properly abstracted, in that this witness testified positively that it was the duty of the employees of the [fol. 142] railroad to warn other employees upon the engine working when the turntable was to be moved.

Wherefore, respondent moves the court to dismiss the appellant's appeal.

John Mcberly, Sizer & Myres, by Wm. J. B. Myres, Attorneys for Respondent.

STATE OF MISSOURI,
County of Barry, ss:

Wm. J. B. Myres, being first duly sworn, deposes and says that he is attorney and agent for respondent in the above-entitled cause, and as such makes this affidavit in his behalf.

Affiant further states that he has read the foregoing motion to dismiss appellant's appeal and that the facts therein stated, with reference to the omission by appellant of testimony as is shown by the bill of exceptions filed in said cause, are true.

Wm. J. B. Myres.

Subscribed and sworn to before me this 21st day of September, 1940. Marie Randall, Notary Public. (Seal.) My commission expires April 9, 1943.

Received a copy of this motion on the 23rd day of September, 1940.

David E. Blair, One of the Attorneys for Appellant.

[fol. 143] SUGGESTIONS IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE APPEAL

Points and Authorities

I

If the appellant shall fail to set forth in his abstract of the record so much of the testimony as is necesary for a complete understanding of all the questions presented for decisions, as required by Rules 13, 14, and 15, the court will dismiss the appeal.

Rule 21 of this court.

Section 1028, Revised Statutes of Missouri, 1929.

II

Because of appellant's failure to properly and fully abstract the testimony, the appeal should be dismissed.

Brand v. Cannon, 118 Mo. 595, 598.
Redler v. Travellers Insurance Co., 342 Mo. 677, 117 S. W. 2d 241, 243.
Bertke v. Hoffman, 330 Mo. 584, 50 S. W. 2d 107, 108.
Craven v. Midland Milling Co., 228 S. W. 513, 514.
Colorado Milling and Elevator Co. v. Rolla Wholesale Co., 102 S. W. 2d 681.
[fol. 144] Gorka v. Gorka, 295 S. W. 515, 516, 221 Mo. App. 1033.
Breck v. Koeneman, 108 S. W. 2d 992, 993, 994.
Shelley et ux. v. Ozark Pipe Line Corp., 247 S. W. 472.

III

Where the point raised on appeal is as to the sufficiency of the evidence to support an allegation of negligence in the petition, all of the testimony must be set forth in the abstract of the record.

Bertke v. Hoffman, 330 Mo. 584, 50 S. W. 2d 107, 108.
Redler v. Travellers Insurance Co., 342 Mo. 677, 117 S. W. 2d 241, 244.
Whitehead v. St. Louis, I. M. & S. R. Co., 176 Mo. 475, 479
Weintraub v. Abraham Lincoln L. I. Co., 99 S. W. 2d 160, 163.
Smith v. Wilson, 296 S. W. 1036, 1039.
Shelley v. Ozark Pipe Line Corp., 247 S. W. 472.

IV

The rule that in determining the sufficiency of the evidence to support an allegation of negligence in the petition, only the testimony most favorable to the plaintiff will be considered, does not excuse the failure to properly and fully abstract the testimony.

Bertke v. Hoffman, 330 Mo. 584, 50 S. W. 2d 107, 108.
[fol. 145] Craven v. Midland Milling Co., 228 S. W. 513, 516.
Weintraub v. Abraham Lincoln L. I. Co., 99 S. W. 2d 160, 163.

V

It is for this court and not for counsel to say whether the testimony omitted from the abstract of the record is pertinent.

Bertke v. Hoffman, 330 Mo. 584, 50 S. W. 2d 107, 108.
Redler v. Travellers Insurance Co., 342 Mo. 677, 117 S. W. 2d 241, 245.
Colorado Milling and Elevator Co. v. Rolla Wholesale G. Co., 102 S. W. 2d 681, 682.

VI

Defects in appellant's abstract of the record cannot be corrected after respondent has attacked it by motion.

Barham v. Shelton, 221 Mo. 66, 69, 119 S. W. 1089.
Harding v. Bedoll, 202 Mo. 625, 635, 636, 637, 100 S. W. 638.
Brown v. O'Bryan et al., 217 S. W. 600, 601.
LeClair v. LeClair et al., 77 S. W. 2d 8[illegible], 863.
Wright v. Metropolitan Life Ins. Co., 122 S. W. 2d 375, 376.
Bank of Kennett v. Tatum et al., 340 Mo. 198, 100 S. W. 2d 475.

[fol. 146] Argument in Support of Motion to Dismiss the Appeal

As disclosed both by the motion to dismiss the appeal and by respondent's additional abstract of the record, appellant has flagrantly violated the rules of this court, as well as the statute in the preparation of the abstract of the record filed herein. The testimony of three witnesses is entirely omitted, this testimony bearing upon and being necessary to a complete understanding of the questions presented for decision on this appeal. Doctors Craig, Dillman and Lembeck testified at great length as to the extent and permanency of the plaintiff's injuries. This testimony is important because it shows at the time that the appellant obtained the signature of the plaintiff to Defendant's Exhibit "D" he was a hopeless cripple and had no means of repaying the money borrowed from the appellant. The appellant failed to abstract the testimony of Joe Smith, in which he testified positively that the turntable, when

moved, moved with a sudden jerk because of the defective condition of the turntable, and that such movement would be approximately six inches. This testimony is very important to determine whether the plaintiff was caused to fall by a sudden movement of the turntable in the form of [fol. 147] a jerk and to fall headlong into the concrete pit, some fifteen or twenty feet distance. The appellant made no attempt to abstract that part of Smith's testimony which was given relative to a custom to warn employees working on an engine while it was on the turntable. Neither was there any attempt to abstract the testimony of Smith relative to the manner in which said warning was usually given.

Appellant failed to abstract the testimony of Barker Duncan relative to material issues now before this court. This witness' testimony covered approximately 58 pages in the bill of exceptions. The appellant abstracted all of this testimony in a space less than six pages. Such abstract, as made of the plaintiff's testimony, is impossible to follow and does not give the true meaning of the testimony as given at the trial. There are so many omissions in the appellant's attempted abstract of the plaintiff's testimony that this court cannot possibly follow the hodgepodge as printed.

The appellant's abstract further shows that other witnesses testified on behalf of the defendant and especially the cross examination of those witnesses was not abstracted, nor was there an attempt to abstract the true meaning of the testimony of such witnesses. The appellant has, through his abstract, omitted numerous material parts of testimony of all of the witnesses, and no attempt to abstract such testimony has been made. The appellant has set out, haec [fol. 148] verba, some of the testimony of some of the witnesses, when the setting out of that testimony was advantageous to the appellant, thereby not giving to this plaintiff the benefit of every favorable inference to which he is entitled from all of the testimony given.

What could have been appellant's motive? That is a very important question in passing upon this motion. The bill of exceptions covers but 256 pages. The time required to abstract the entire record would not have taxed the effort of appellant's counsel, but instead of making a proper abstract, there is nothing but a smattering of a few points which the appellant thought was important to his appeal.

That this appeal should be dismissed is well settled by decisions of this and the other appellate courts of this state

in a uniform line of decisions, dating back to an early date. The Supreme Court very recently had occasion to review its prior decisions on this question, in Redler v. Travellers Insurance Company, 342 Mo. 677, 117 S. W. 2d 241, where, at l. c. 243, it said:

"In Brand v. Cannon, 118 Mo. 595, 24 S. W. 434, 435, this court said:

'When a party obtains a judgment of a court of competent jurisdiction in his behalf, the presumptions are all in favor of its validity and the correctness of the means by which it was obtained, and the burden is on one who al- [fol. 149] leges error to show it. The law of this state has cast upon the appellant, not the respondent, the onus of preparing a printed abstract of the entire record of the cause, which he shall serve on his opponent and file in this court. * * * If a party, relying upon the provision that his opponent, if not satisfied, shall file a further abstract, can cast the burden on his adversary by filing a wholly insufficient and garbled abstract, it can readily be seen that the burden will be on the respondent to maintain his judgment and not on the appellant to reverse it. Moreover, after the respondents have successfully prosecuted their suit to a judgment, there is no principle of justice that would require them to incur the labor and expense of furnishing this court with the information necessary to a proper determination of this appeal. * * * It is natural that counsel should differ as to the materiality of some things, and for that reason the respondents are permitted to supplement the abstract of appellants, but it was never intended that a mere perfunctory performance of this duty should cast the expense on the respondents.'

This court has been liberal in the construction of its rules and the statute in order to determine cases on their merits whenever there has been a reasonable and substantial compliance with these requirements. It has done so, even if the evidence was not properly abstracted, when 'the abstract is sufficiently clear to present the questions raised.' Moberly v. Watson, 340 Mo. 820, 102 S. W. 2d 886, 887. Nevertheless, it has dismissed appeals in recent cases in [fol. 150] which there was a palpable violation of Rule 13. See State ex rel. Consolidated School District v. Cox, 323 Mo. 43, 18 S. W. 2d 61; Aulgur v. Strodtman, 329 Mo. 738, 46 S. W. 2d

172, 173; State ex rel. School District of Kansas City v. Lee, 334 Mo. 513, 66 S. W. 2d 521; Werminghaus v. Eberle, (Mo. Sup.) 81 S. W. 2d 607; State ex rel. Robinson v. Wright, (Mo. Sup.) 85 S. W. 2d 561; Payne v. Payne, 338 Mo. 224, 89 S. W. 2d 665; Bank of Kennett v. Tatum, 340 Mo. 198, 100 S. W. 2d 475."

And at l. c. 244:

"Appellant here contends that she was entitled to a directed verdict. The rule is that 'in an action at law if appellant seeks a reversal on the ground that there was no evidence to support the verdict, or that a demurrer to the evidence should have been sustained, all the evidence must be presented.' Aulgur v. Strodtman, supra; State ex rel. Guinan v. Jarrott, 183 Mo. 204, 81 S. W. 876. Appellant not only failed to present 'all the evidence' in a manner which would comply with Rule 13, but failed to present, in any form whatever, much of the evidence."

The first point made in appellant's brief under points and authorities, page 10, was that the plaintiff had failed to make a case and that the demurrer to the evidence should have been sustained. Under the ruling of the above case, it was the duty of the appellant to abstract all of the [fol. 151] testimony of all of the witnesses. The failure to do so puts the burden upon the respondent to abstract all of the record of all of the witnesses in order to sustain his judgment in this court. This duty, under the rules of this court and the statute, was imposed upon the appellant to convince this court that error was committed below.

In Bertke v. Hoffman, 330 Mo. 584, 50 S. W. 2d 107, this court said, at l. c. 108:

"Appellant's first point is that the trial court erred in refusing to give defendant's demurrer to the evidence. Appellant's abstract of the record purports to give in about 16 pages, chiefly in narrative form, 'all the evidence introduced in the entire case,' but it plainly shows that certain exhibits received in evidence have been omitted therefrom, and even states that evidence was omitted therefrom because not 'pertinent to the points raised on this appeal.' *It is for the court and not for the appellant to determine whether the evidence is pertinent.* We adhere to our holding in Harrison v. Pounds, 190 Mo. 349, 351, 88 S. W. 713, that

'it is the settled rule of law in this court that where we are asked to pass upon a demurrer to the evidence, or as to whether there is any evidence to establish a fact, that the appealing party must bring all the evidence before this court, otherwise we will not disturb the finding of the trial court.' See, also, Davis v. Vories, 141 Mo. 234, 241, 42 [fol. 152] S. W. 707, and O'Malley v. Construction Co., 255 Mo. 386, 392, 164 S. W. 565."

The cases consistently hold the appellant may not, after his abstract of the record has been attacked by motion of respondent, correct the omissions therein. See cases cited under Point VI.

Under the rules of this court the burden is upon the respondent to supply this court with the additional abstract necessary for a complete understanding of the issues. The respondent has accepted that responsibility by filing herein an additional abstract covering some 31 pages. That in nowise detracts or alters the rules and the statute imposing this duty upon the appellant to file in this court an abstract of all of the testimony.

We, therefore, insist that the abstract, as filed by the appellant, is insufficient. The rules of this court and Section 1028, Revised Statutes of Missouri, 1929, have been flagrantly violated, and this motion to dismiss the appeal should be sustained.

Respectfully submitted, John Moberly, Houston, Missouri, Sizer & Myres, Monett, Missouri, Attorneys for Respondent.

[fol. 153] In Springfield Court of Appeals

Minute Entry—October 9, 1940

Now again come the parties aforesaid, by their respective attorneys, and after argument herein submit this cause to the Court.

[fol. 154] In Springfield Court of Appeals

Judgment—December 14, 1940

Now again come the parties aforesaid, by their respective attorneys, and the Court being now sufficiently

advised of and concerning the premises, doth consider and adjudge that respondent's motion to dismiss the appeal herein be and the same is hereby denied and that the judgment rendered herein by the said Circuit Court of Texas County be reversed, annulled, and for naught held and esteemed; that the said appellant be restored to all things which he has lost by reason of the said judgment; that the said cause be remanded to the aforesaid Circuit Court of Texas County with directions to the trial court to dismiss plaintiff's suit and render judgment for the defendant for its costs.

Opinion filed.

[fol. 155] In Springfield Court of Appeals, October Term, 1940

No. 6194

Barker Duncan, Respondent,

vs.

Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of Texas County, Missouri. Honorable William E. Barton, Judge

Thos. J. Cole, St. Louis; Hiett, Covert & Hiett, Houston; David E. Blair, Joplin, Atterneys for Appellant.

Sizer & Myres, Monett; John Moberly, Houston, Attorneys for Respondent.

Reversed and Remanded with Directions to Dismiss Plaintiff's Case.

Opinion—Filed December 14, 1940

Tatlow, P. J.:

Statement

This is an action for injuries alleged to have been suffered by the respondent (plaintiff below), as an employee of the appellant (defendant below), through the appell-

lant's negligence. The parties will be referred to herein as plaintiff and defendant.

The suit was filed in the Circuit Court of Newton County, Missouri, on April 4, 1938, and was tried on change of venue in the Circuit Court of Texas County, Missouri, on March 7th, 1940. The accident occurred on April 10, 1936.

The petition alleges, among other things:

"Plaintiff states that on and prior to the 10th day of April, 1936, he was in the employ of defendant as a shop laborer, in defendant's roundhouse and turn-table at [fol. 156] Nevada, Missouri; that plaintiff's duties required him to assist in repairing and servicing and keeping in order the defendant's locomotives and other equipment in defendant's roundhouse at Nevada, Missouri; that his duties required him to service and assist in servicing defendant's interstate and intrastate engines during their run and at the end of their runs. Plaintiff states that as such employee, he does not know whether he was, at the times herein mentioned, engaged along with the defendant in interstate or intrastate commerce, but states that it was the one or the other, but he verily believes that it was an interstate rather than intrastate, and if in interstate, the relationship between plaintiff and defendant was, and is governed by the Federal Employers' Liability Act, passed and approved by the general Congress of the United States, together with all the amendments thereof; that if in intrastate, his cause of action is governed by the State compensation laws of Missouri.

"Plaintiff states that if as such interstate employee, the defendant owed him the duty to exercise ordinary care toward him, and to furnish him with a reasonably safe place to work, and to furnish him with tools and appliances so as to make the performances of his duties reasonably safe, and to furnish employees who would not negligently injure plaintiff; that the defendant owed the duty to plaintiff to exercise ordinary care to adopt a method of performing its works in servicing the engines reasonably safe method; that defendant's foreman over the plaintiff owed the duty to exercise ordinary care in directing and ordering plaintiff about his work; that defendant owed the duty to warn plaintiff and other employees working on engines on the turn-table at the roundhouse at Nevada, when such turn-table was going to be moved."

Said petition contained five specific allegations of negligence, lettered from (a) to (e), one of said allegations being as follows:

"(c) In that the defendant, his agents, servants, and employees negligently and carelessly, without warning, contrary to a long established custom to warn men on the engine when it was to be moved, moved the turntable and engine upon which plaintiff was working, and caused plaintiff to be thrown from the engine to the bottom of the turn table pit."

It then alleged the injuries suffered by the plaintiff and prayed judgment for $37,500.00.

[fol. 157] The amended answer on which the case was tried, admitted that the Missouri Pacific Railroad was duly incorporated and that the defendant Guy A. Thompson was its duly appointed and acting trustee; and denied each and every other allegation in said petition contained. The amended answer also contains the defense that the plaintiff assumed the risk and that his injuries, if any, were caused by his own negligence. Said answer also contains the following:

"Further answering said petition, defendant states and alleges that on or about August 13, 1937, and after the alleged injuries were received by the plaintiff and before this case or action was commenced by plaintiff, the defendant paid to the plaintiff the sum of six hundred dollars ($600.00), and, in consideration of such payment to him of said sum of $600, plaintiff then and there and on or about August 13, 1937, agreed with defendant, by his written agreement then and there executed by plaintiff and delivered by him to defendant, as follows:

"'In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit.'

"Defendant further states and alleges that plaintiff, before beginning or commencing this suit and action, did not tender or pay back to defendant, or any-one for him, said

sum of $600 and that this suit and action have been begun and commenced by plaintiff without the pre-requisite return to defendant trustee of said sum of $600, and plaintiff could not and cannot lawfully file or maintain this suit and action against defendant, and this action is premature and should be dismissed by the Court."

It contains also the following:

"Further answering said petition, defendant states that plaintiff is seeking to recover a verdict and judgment against defendant for damages under the Federal Employers' Liability Act and defendant states that recovery and enforcement of any such judgment in this case or action, if any, against defendant, and under the facts in evidence and as alleged in said petition, would deprive defendant of [fol. 158] a right, privilege and immunity to which defendant is entitled and which defendant should be permitted to enjoy under said Federal Employers' Liability Act, as set forth and defined in Title 45, of the United States Code Annotated, and particularly under sections 51, 52, 53 and 54, thereof."

Plaintiff was permitted to dictate a general denial of defendant's amended answer into the record.

A photostatic copy of the agreement, which contains the paragraph pleaded in the answer, was offered as a part of plaintiff's case, as was also a sight draft, dated August 13, 1937, drawn by defendant's claim agent, payable to the order of plaintiff, for $600.00, which bears plaintiff's endorsement and also the endorsement of the "Hurlbut Und. Co., Newell G. Hurlbut", and shows that the same was paid on September 14, 1937, to the plaintiff's assignee.

At the close of plaintiff's case, defendant requested the court to instruct the jury that the contract was a complete bar to the further prosecution of the action, and to withdraw the suit from further consideration by the jury, and to dismiss the same "without prejudice to the plaintiff". This the court refused to do and exceptions were duly saved.

At the close of all of the evidence in the case, the defendant requested the court to instruct the jury as follows:

"Now at the conclusion of all of the evidence in this case, the Court instructs the jury that, under the law and all of

the evidence in this case, plaintiff is not entitled to recover judgment against the defendant, and the verdict of the jury will be in favor of the defendant".

which instruction was by the court refused; to which action, ruling and refusal of the court to give said instruction to the jury, the defendant trustee, by his counsel, then and there duly excepted and at the time saved his exceptions.

At the instance of the plaintiff the court gave the following instruction No. 2.

[fol. 159] "The Court instructs the jury that the defendant has set up in his Answer as a defense to plaintiff's recovery a loan or partial settlement agreement, whereby plaintiff secured $600, pending further negotiations for a settlement of the plaintiff's cause of action, and which sum of money was to be returned to the defendant before instituting any suit.

"Therefore, if you shall find and believe from the greater weight or preponderance of the testimony that plaintiff was induced to execute and sign such instrument, by defendant's claim agent, or agents, representing to him that his cause of action was governed by the compensation laws of the State of Missouri, if you so find, and if you further find that the defendant, his agents, servants, and employees further represented to the plaintiff that the said payment of $600 was only a partial settlement of plaintiff's cause of action before the Missouri Workmen's Compensation Commission, if you so find, and that such representations were false and untrue, and were known to the defendant to be false and untrue, if you so find, and that plaintiff relied upon said representations as being true, and was thereby induced to sign said instrument, if you so find, then such instrument is no defense to this cause of action, but if you find the issues for the plaintiff in a sum greater than $600, you should give the defendant credit for the sum of $600, thereby reducing the amount of his recovery, if any, to the extent of $600, with interest thereon at the rate of six per cent (6%) from the date of its receipt".

To which action of the Court in giving said instruction to the jury on behalf of the plaintiff, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The court refused to give defendant's requested instruction No. D. R. G., as follows:

"The court instructs the jury that if you believe and find from the evidence that the contract not to sue, introduced in evidence, was read by plaintiff, and after such reading by the plaintiff, the plaintiff signed the same, then the law presumes that the plaintiff at the time he signed the same was a person of sound mind and capable of comprehending the business in which he was engaged and the nature of the contract he was making; and the Court further instructs you that the burden is upon the plaintiff to prove by the greater weight of evidence that at the time he signed the release that he was incapable of comprehending the business in which he was engaged and the nature of the contract he was making, [fol. 160] unless you believe and find from the evidence that the plaintiff has so proven such facts, then the plaintiff is bound by the terms of said release and your verdict must be for the defendant."

To which action of the Court in refusing to give said instruction to the jury on his behalf, the defendant trustee, by his counsel, then and there duly objected and excepted and at the time saved his exceptions.

The testimony of the plaintiff with reference to the contract pleaded in the answer is set out in haec verba in appellant's abstract, and is abstracted in respondent's supplemental abstract. For brevity we will adopt the respondent's abstract of his testimony, which is as follows:

"I signed this instrument. When the instrument was first put before me I refused to sign it because I asked him (Mr. Salter): 'What is this? Is this a release that you are asking me to sign?' He said, 'No, sir, it is not a release, it is a formality that we have when we advance a person money on their claim.' I said, 'Well, this states that you can't bring suit,' and Mr. Salter said, 'Now, Mr. Duncan,' he said, 'we are going to take care of you; as far as any suit is concerned, that is not necessary because we are going to see that you are well imbursed for your injuries.' If he had not made that statement to me and the further statement that my claim was under the Missouri Workmen's Compensation Act, I would not have signed the instrument marked Plaintiff's Exhibit 'D.' No one else signed this statement on behalf of the Missouri Pacific Railroad Company, either at the time I signed it, or at any other time. No official of the Missouri Pacific Railroad Company signed this statement. I was the only one that signed it.

"(Witness was handed Plaintiff's Exhibit 'E,' which was a check for $600.)

"This is a check which Mr. Salter gave me. After I signed this instrument marked Exhibit 'D' he gave me the $600 draft, marked Exhibit 'E'. He gave me the draft after I had signed Exhibit 'D.' After I signed this instrument and received the $600 draft, and cashed it, the Missouri Pacific Railroad Company hasn't, at any time after that, made any effort to settle my case. The Missouri Pacific Railroad Company has refused to negotiate a settlement with me. I received the $600, and have offered to pay back no part of it. After signing these two instruments, I have [fol. 161] received no further offers of settlement. * * *."

On cross examination plaintiff testified:

"* * *. I received the $600 draft, marked Plaintiff's Exhibit 'E', and I have never re-paid any part of it. I had not repaid any part of it before this suit was commenced. I read Exhibit 'D' over before I signed it, and was furnished a copy of it. I carried a copy away with me when the draft was given me, marked Exhibit 'E'. The draft bears date of August 13, 1937, which was something like sixteen months after I was injured. I carried the draft around about a month before I cashed it. I cashed it on the 15th day of September. That is the day that I buried my wife, and paid the funeral bill. This draft, marked Exhibit 'E' paid the funeral bill of my wife. * * *."

Plaintiff's testimony as to his injuries and treatment was, in substance: His foot was broken and the ankle joint and the heel were mashed up into the foot and broken; the accident caused an injury to his knee to this extent—that he can't walk good with it; the accident also injured his hip and the small of his back. Shortly after the accident he was taken from his home to the Missouri Pacific Hospital in St. Louis. He stayed in the Missouri Pacific Hospital four or five weeks, probably six weeks. Upon his arrival at the hospital they operated on him and when he came out of the operating room they had pins through his legs and through his foot, and a cast up to his knee, with a big bunch of iron or weight on the bottom. At the end of six weeks he went home and stayed a few days, and then returned to the Missouri Pacific Hospital at St. Louis. On the second trip he stayed several weeks and was operated on again. He reported to

the hospital every thirty days. In February, 1937, he went back to the hospital for an operation on his foot, at which time they cut the foot open around the joint and went in and "chiseled off the joints or smoothed them down and put it in a more working condition". He has a scar about six inches long where this operation was performed. He stayed in the hospital six weeks at this time and continued to report [fol. 162] to the hospital once a month and stayed there on occasions. He was on crutches the greater part of two years; can walk now a short distance without a cane, but if he walks any length of time without a cane, the weight is too great and the pain is too intense; his foot starts swelling and he "can't make it". He has tried to work, dressing poultry and picking chickens at the North Main Street Produce, at Joplin, Missouri. He worked there about three months the first time, and could not continue to do that work, because the job required a man able to carry 100 pound sacks of feed, and it was necessay to load and unload customers, and he couldn't do it. He has tried to do other kinds of work but has been unsuccessful.

O. L. Salter testified that he is a lawyer and claim agent for the Missouri Pacific; that he investigated this accident and made the $600 payment to plaintiff; that Mr. Duncan came to the office the morning he made the payment, and stated that he had come to see if he couldn't get some money in connection with his accident; that his wife was in the hospital and he was getting behind with his debts and was badly in need of some money. He asked him how much he needed—what he could get by on, and that he would take it up with Mr. Butler and see if it could be arranged. Mr. Butler is the Assistant Claim Attorney, and Mr. Salter's superior. Finally $600 was the figure that Mr. Duncan thought would tide him over. Mr. Salter identified the signature to Exhibit E and testified that he gave a copy of it to the plaintiff and also gave him Exhibit E, which plaintiff took away with him.

"Q. And state if you told him at that time that his case was under the Missouri Workmen's Compensation Commission?

A. I told him it was not under the Compensation."

Mr. Salter testified on cross examination that, in August, 1937, he knew that plaintiff's case was under the Federal

Employer's Liability Act and not under the Missouri Work-
[fol. 163] men's Compensation Act. On re-direct examination he testified that he gave plaintiff a copy of Exhibit D at the time he got the draft, and explained to plaintiff that the $600 was not compensation and that he had checked consist of train and it had interstate cars in it. He told Duncan his case was under the Federal Act, and that, since it was not a compensation that under the Federal Act they had always heretofore "just taken one release, but so many employees, when they had a long disability period like plaintiff had had, of a year or more, and their debts increased and they came in, so something had to be done and this form was devised so they could help them out just as well under the Federal to tide them over until they had their recovery before we negotiate final settlement". He told plaintiff his case was not under the Missouri Workmen's Compensation Act; that if it had been they would have been paying him every two weeks since the date of the injury.

On re-cross examination Mr. Salter testified that plaintiff came into the office on crutches or on a cane; that he knew plaintiff's condition.

The defendant admitted that the engine in controversy pulled freight train No. 264 from Joplin, Missouri, to Nevada, Missouri, on the day of the injury, and was being serviced to pull train No. 263 from Nevada to Joplin on the same day. Each of the trains contained cars and merchandise traveling from and to points outside of Missouri.

Instruction No. 1, given for the plaintiff, is as follows:

"The Court instructs the jury that this case is being tried under the Federal Employers' Liability Act, as the plaintiff and the defendant admit that both the plaintiff and the defendant were engaged in interstate commerce at the time of the accident."

Plaintiff's evidence tended to show that, after he signed [fol. 164] Exhibit D and cashed the draft, he was unable to get a final settlement before bringing suit, although he made an effort to do so.

The verdict of the jury is as follows:

"We, the Jury, find the issues for the plaintiff and we assess his recovery at $5,691, and we further find that on such judgment the defendant is entitled to the sum of $600 principal and $91 interest, and subtracting said $691 from

the said $5,691, due plaintiff, the total due plaintiff is $5,000.

(Signed) C. D. Keller, Foreman."

The defendant at no time conceded liability for plaintiff's injuries. On the trial of the case a jury question developed as to whether plaintiff's injuries were caused by the moving of the turn-table by defendant's agents without warning to the plaintiff, or whether plaintiff simply lost his balance while the turn-table was stationary, and fell from the engine down into the concrete pit of the turn-table.

Opinion

I

The plaintiff has filed a supplemental abstract and also a motion to dismiss the appeal for the reason that defendant failed to present a full and complete abstract. We think that the defendant's abstract is sufficient to fully present the case, but in any event any defects therein are fully covered by the plaintiff's supplemental abstract; therefore, plaintiff's motion to dismiss the defendant's appeal is denied.

II

Plaintiff, in his petition, presents an anomaly in pleading. He pleads that his case is either under the Federal Employer's Act or the Missouri Workmen's Compensation Act; [fol. 165] he does not know which, but believes it is under the Federal Employer's Liability Act.

This case clearly does not come within the statute authorizing an alternative plea. Our statute provides:

"Either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance whether it be the one or the other." (Sec. 798 R. S. 1929).

Each alternative pleaded in a petition must set out a good cause of action. If pleaded in the answer as a defense it must allege and set out a complete and perfect defense. Hewitt v. Truitt, 23 A. 443; Beall v. January, 62 Mo. 434.

Plaintiff, in his petition in this case, instead of stating a cause of action, says in effect that he does not know whether

he has a cause of action, but thinks he does have. If his claim were within the Missouri Workmen's Compensation Act, then he would not have a common law cause of action for damages, as a proceeding before the Workmen's Compensation Commission would be his exclusive remedy. Gardner v. Stout, 342 Mo. 1206, l. c. 1214, 119 S. W. (2d) 790, l. c. 793. Hence, it is perfectly apparent that plaintiff's cause of action could not be pleaded in the alternative. He either had a cause of action under the Federal Employer's Act or he had no common law cause of action.

This would necessitate a reversal of the case but for the fact that the defendant admitted that plaintiff's cause of action, if any, was under the Federal Employer's Act. The court so instructed the jury, based on such admission.

III

The next question for decision is whether Exhibit D falls within the provision of that act, which is title 45, sec. 55 of the Code of Laws of the United States, which was in force [fol. 166] on April 10, 1936, the date of the accident, and when the suit was filed on April 4th, 1938. It provides:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which such action was brought."

If Exhibit D is covered by this section of the Act, then it is no obstacle to plaintiff's recovery; the agreement is void without regard to fraud in its procurement, and, under the proviso clause of the section, defendant is only entitled to set off the $600. If it is not within the act, unless plaintiff had elected to rescind the agreement under the terms of the agreement, or for fraud, and returned or tendered the $600 to the defendant before instituting this suit, the agreement is an insuperable obstacle to his right of recovery in this suit. Plaintiff contends that Exhibit D is within the terms of the Act and to support this contention

relies on the case of Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 616, 56 L. Ed. 911, 917.

In that case the plaintiff was employed on the 18th day of October, 1905, and signed a contract of membership in the company's relief department, in which he agreed that the company should apply $2.10 a month out of his wages as a voluntary contribution for the purpose of securing the benefits described in the regulations. The contributions continued from the date of plaintiff's employment to the date of his accident on May 13, 1908. The regulation with reference to the acceptance of benefits, was:

[fol. 167] "* * * the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the company. * * *."

The plea in that case alleged, among other things, that, during the period of the plaintiff's membership in the company's relief department, the company's total contribution to the fund was $57,610.51. It also alleged:

"* * * after his injury Schubert (between June, 1908, and August, 1908) had voluntarily accepted benefits amounting to $79; that he had subsequently presented his claim for damages, in view of which no further payments were made, and that the acceptance of the benefits above mentioned was a bar to his action."

The court in that case sustained a demurrer to the plea and Schubert recovered judgment for $7,500.00.

That case presented a constitutional question that is not involved here—that is, whether the act, under the 5th Amendment, could apply to a contract of employment and its incidents, entered into prior to the passage of the act; and it was held that it could be so applied. It discusses also the question here involved, as to what contracts are covered by the Act, and says:

"* * * The former act of June 11, 1906, chap. 3073 (34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316), which was valid as to employees engaged in commerce within the District of Columbia (citing cases), contained explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that act was as follows:

"'That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: * * *.'"

It contained the same proviso as the existing section does.

The court then proceeds to say:

[fol. 168] "But it is urged that the substituted provision —of sec. 5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act.' It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. * * *."

Observe that, in order to ascertain the meaning of the present act, the court went back to the terms of the antecedent act which referred to a "contract of employment", and held that the purpose of the change in the phraseology in the later act was to extend and enlarge it, rather than to limit it; but there is no suggestion that the act was extended to cover not only contracts of employment but also compromises and settlements of completed and existing causes of action arising out of such employment. We are unable to find in the opinion anything that would indicate that the statute was intended to cover such settlements and compromises entered into by the parties after the relation of employer and employee had been severed. The reasoning of the court would seem to be to the contrary, for it is further said:

"* * * The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be

found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. * * *."

This would seem to clearly indicate that the contract the statute had in mind was the original contract of employment; and all incidents and contracts seeking to exempt the company from liability for negligence, entered into before the injury or death occurred. There is no question but what, under that case, Congress would have the power to render such contracts of settlement void, even after the cause of action accrued, and confine the company's right to [fol. 169] a set-off of the amount that it might have paid under any such settlement or compromise. The question here is not a question of the power of Congress, but whether Congress has exercised that power. That case does not directly decide the question, but its reasoning would seem to indicate that the statute does not apply to a compromise and settlement of an existing and completed cause of action.

It certainly seems that, if Congress had such a thought or desire, it would have employed some word indicating it, such as "compromise", "settlement", or "accord and satisfaction". The words "any contract" in the section, standing alone, are of course broad enough to cover an accord and satisfaction, but, when read in connection with the phraseology of the act referring to "insurance", "relief benefit", or "indemnity", it does not cover such contract of settlement after the cause of action has accrued. This was undoubtedly true with reference to the 1906 Act, which referred only to a "contract of employment". The 1908 Act still refers only to contracts that exempt the employer from liability created by the Act. A compromise and an accord and satisfaction of an existing cause of action does not exempt the employer from liability, but, on the contrary, expressly recognizes such liability and renders to the employee a quid pro quo therefor. The obligation does not arise solely out of the employment but out of the injury or death through the negligence of the employer. The accord and satisfaction is a separate and independent contract and agreement only incidently connected with the original contract of employment.

The Supreme Court of Arkansas, in the case of Kansas City Southern Ry. Co. v. Sanford, 31 S. W. (2d) 963, had

before it the question as to whether a compromise agreement of a cause of action arising under the employer's liability act could be set aside for fraud by the mere preponderance of the evidence, or whether, in such a case, the burden was upon the plaintiff to establish its allegations of fraud or mistake by evidence clear, cogent, and convincing (which is the applicable rule in equity). Concerning this question the court says:

[fol. 170]

"* * *. The Federal Employers' Liability Act and the principles announced by the federal courts for its interpretation and application are limited to a declaration of the substantive law fixing liability and the conditions under which causes of action may exist, but that the remedies for making effective those rights or enforcing the liabilities created must be determined by the laws of the forum in which the action is brought. * * *."

The court further says:

"* * *. That the right to recover for the injury and the rules by which that injury is to be established is governed by the act of Congress, as construed by the federal courts, cannot be denied. To our mind, it is equally certain that, where the action is brought in a state court, the procedure for making effective that right is determinable under the rules of procedure in that state. * * *."

In that case a writ of certiorari was denied by the Supreme Court of the United States, 283 U. S. 825, 75 L. Ed. 1439. That case would seem to support the contention of the defendant that Section 55 of the Employer's Liability Act does not apply to a contract of compromise and settlement, negotiated and entered into in pursuance to a treaty between the parties after the injury or death, and after a completed cause of action had arisen. This is also further indicated by the language of the court in the case of Philadelphia, B. & W. R. Co. v. Schubert, supra, where the court says:

"* * *. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits i the performance of the promise to pay contained in the contract of membership. * * *."

On the same principle, the court cannot ignore the fact that the "accord and satisfaction" in the instant case

[fol. 171] arises not out of the original employment—but out of a separate and distinct contract between the parties after the termination of the employment.

The exact question has been decided by the Supreme Court of Minnesota in the case of Detwiler v. Lowden, 269 N. W. 367. The facts in that case are that the accident causing plaintiff's injuries happened in the State of Kansas, where plaintiff resided. The answer alleged that about four months after the injuries were received plaintiff, in consideration of $100.00 advanced to him by the defendants, agreed, in good faith, to amicably settle with defendants for his injuries, and, if the claim could not be adjusted, he covenanted with defendants not to sue them or the railroad company for any damage on account of said injuries in any courts outside of the state of his residence at the time of said injuries, or outside of the state where said injuries occurred. Concerning this agreement, the court said:

"The covenant cannot be held to contravene either section 55 or 56 of title 45 U. S. C. A. (Federal Employers' Liability Act, sections 5, 6). It is clear the covenant does not infringe section 55, reading: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.' The covenant does not attempt to settle the cause of action, nor does it exempt defendants from any liability created by the act. * * *."

In the instant case, the agreement does not attempt to settle the cause of action, except upon the condition plainly provided therein—that the plaintiff elects to treat it as the final settlement of his cause of action but confers upon him the power to, at his election, rescind the agreement by returning the $600.00, and making such return a prerequisite to the filing of a suit.

This provision is perfectly plain and unambiguous and is clearly valid. Goltra v. Weeks, 271 U. S. 536, l. c. 547, 548, [fol. 172] 70 L. Ed. 1074, l. c. 1080. It gives plaintiff the absolute right of rescision, subject only to the return of the $600.00; his duty to return the money would be implied even if it were not expressly provided for. 12 Am. Juris. p. 1031, section 451. To allege and prove fraud adds

nothing to plaintiff's right to rescind; such allegation and proof is supererogation on plaintiff's part. The duty to make restitution as a condition to rescinding is a question of procedure and not of substantive law, and, hence, is governed, not by the Federal Employer's Liability Act (unless the agreement is brought within the terms of that act—which it is not), but by the law of the forum as decided in the Arkansas case.

IV

The next and last question is whether, under the Missouri statute and decisions, the plaintiff is relieved from making restitution by alleging and proving fraud as a prerequisite to bringing a suit. Our statute provides:

"Whenever a release, composition, settlement or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from plaintiff," etc. (Sec. 782 R. S. 1929).

It seems to us that, in order for Exhibit "D" to come within this section, it must discharge and bar the cause of action sued on. It does not finally bar the cause of action but only suspends it until restitution is made; in the instant case it is a dilatory plea barring only the right of the plaintiff to maintain this particular suit, and not his cause of action. It is, of course, a complete bar to plaintiff's cause of action if he elects to treat it so by refusing or failing to exercise his right to rescind, under the terms of the agree-[fol. 173] ment. However, plaintiff's case is not in the least aided by assuming that it is covered by the Missouri statute. The defendant contends that the alleged fraudulent representations relied upon by the plaintiff are not fraudulent; that they were at most but the expression of opinion on the part of the claim agent, and not the false representation of an existing fact. Defendant cites in support of this contention: Wingfield v. Railroad, 257 Mo. 347, 166 S. W. 1037; Ray County Savings Bank v. Hutton, 224 Mo. 42, 123 S. W. 47.

We are inclined to agree with defendant's contention—without giving it the consideration we otherwise would—

for the reason that even if the fraud were sufficient to entitle plaintiff to set aside the release, it would not enable him to do so without returning or offering to return the $600.00 which he received; in order to do so he would have to plead and prove facts showing that the $600.00 would not have been accepted by the defendant, if tendered. Wessel v. Waltke and Co., 196 Mo. App. 582, 190 S. W. 628. The plaintiff did not attempt to plead or prove that the defendant would not have accepted the $600.00 if it had been tendered before the suit was brought. It is perfectly apparent that it would have been accepted because the instrument expressly provides for the return of the money and places upon plaintiff the obligation to return it. There is no conceivable reason why the defendant would have refused to accept the $600.00 if it had been tendered. Defendant's refusal to accept the money would have constituted a voluntary donation on defendant's part to the plaintiff, as the instrument clearly, plainly and unambiguously gave the right to the plaintiff to rescind the contract upon the return or tender of the amount paid to him. In addition to this, our Supreme Court, in a very recent case, has directly held:

[fol. 174] " * * * Fraud in the *factum* renders the contract void, and no tender is necessary. Fraud in the treaty renders it merely voidable, and, absent some other ground dispensing with the rule, tender is prerequisite to an action on the original cause. * * *." (State ex rel. United Commercial Travelers v. Shain, 339 Mo. 903, l. c. 912, 98 S. W. (2d) 597, l. c. 602.)

In the instant case, assuming that fraud was sufficiently alleged and proven, it, beyond any possibility of doubt, related to the treaty and not to the factum and would not, and did not, relieve the plaintiff from the obligation to return or tender the $600.00 as a prerequisite to bringing this suit; this is shown by a long list of authorities, cited by our Supreme Court in the case last cited.

There is neither pleading nor proof that the plaintiff did not possess legal capacity to enter into the contract of settlement; it was not signed until more than a year after the accident; plaintiff did not cash the draft until a month after the contract was signed, which gave him ample opportunity to read it and ascertain its meaning.

He admitted that he had read it before he signed it. It is perfectly plain and unambiguous so that anyone of ordinary intelligence, possessing legal capacity to contract, could not possibly mistake its meaning. In addition to this, the suit was not filed until nearly a year after the contract was signed, at which time plaintiff had the benefit of advice of counsel; and if plaintiff's counsel had made a competent investigation of the question he would have been forced to the conclusion that the alleged fraud was not sufficient to excuse the plaintiff from making restitution.

The suit was evidently brought upon the conception that the agreement was rendered void by the Federal Employer's Act, and the plea of fraud is no doubt an afterthought on the part of counsel for plaintiff to excuse the failure of the plaintiff to return the consideration received. [fols. 175-176] Our conclusion is that unless Exhibit "D" can be brought within Section 55 of the Employer's Liability Act, supra, (which, in our judgment, it cannot) then there is no possible escape from the inevitable conclusion that plaintiff's suit was prematurely brought and must be, and is, reversed with directions to the trial court to dismiss plaintiff's suit and render judgment for the defendant for its costs. It is so ordered.

W. D. Tatlow, P. J.

Smith, J., Concurs. Fulbright, J., Concurs.

[fol. 177] In Springfield Court of Appeals

[Title omitted]

Respondent's Motion for Rehearing—Filed December 24, 1940

Comes now the Respondent and moves this Court to grant a rehearing in this cause and affirm plaintiff's judgment for the following reasons:

Because:

I

The opinion herein announces the following erroneous doctrine that the device, marked Exhibit "D" does not come within the provision of the Federal Employers' Liability Act, to wit, Title 45, Section 55.

The opinion holds that said Exhibit does not come within the provision of the above section, and constitutes a "compromise and settlement," or an "accord and satisfaction," and the language used throughout the opinion clearly shows that the Court labored under the false assumption that this exhibit was a "compromise" and "settlement," such as is shown in the following excerpt. On page 14, of the opinion, [fol. 178] the Court uses this language:

"But there is no suggestion that the act was extended to cover not only contracts of employment but also *compromises and settlements* of completed and existing causes of action arising out of such employment. We are unable to find in the opinion (referring to Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603—56 L. Ed. 911) anything that would indicate that the statute was intended to cover such *settlements* and *compromises* entered into by the parties after the relation of employer and employee had been severed."

The opinion further recites on pages 14 and 15, after quoting from Schubert, supra, that:

"This would seem to clearly indicate that the contract the statute had in mind was the original contract of *employment;* and all incidents, and contracts seeking to exempt the Company from liability for negligence, entered into *before* the injury or death occurred. There is no question, but what under that case, Congress would have the power to render such contracts of settlement void, even after the cause of action accrued, and confine the Company's right to a set-off of the amount that it might have paid under any such *settlement* or *compromise*. The question here is not a question of the power of Congress, but whether Congress has exercised that power. That case does not directly decide the question, but its reasoning would seem to indicate that the statute does not apply to a *compromise* and *settlement* of an existing and completed cause of action."

The above language is in direct conflict with the holding of the United States Supreme Court in Schubert, supra, because:

First, the agreement signed by the plaintiff in the instant case was not a "*compromise and settlement.*" The defendant concedes in his brief that the same does not in any way

constitute a compromise and settlement. The opinion then jumps to contrary position from above quoted, and holds that the same does not in any way constitute a compromise and settlement, as shown by the following language used on page 18:

"It seems to us that in order for Exhibit "D" to come within this section it must discharge and bar the cause of action sued on. **It does not finally bar the cause of action,** but only *suspends* it *until restitution is made;* in the instant case it is a dilatory plea barring only the right of the plaintiff to maintain this particular suit and not his cause of action."

Exhibit "D" is therefore a device concocted to limit and forever bar the plaintiff's cause of action under the Federal Act.

[fol. 179] Second, the above language is further erroneous in holding that Title 45, Section 55, U. S. C. A., does not apply to a contract and agreement which is made subsequent to an injury received by an employee while engaged in interstate commerce. The very purpose of the Act and the amendment as made by Congress in 1908 was to bring within the provision of the Section "any contract, rule, regulation or *device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act.*"

The intention of Congress in passing Section 5, of the Act of 1908, was to prohibit the common carrier from exempting or limiting liability created by the Federal Employers' Liability Act. The defendant admits that the parties herein were engaged in interstate commerce at the time that the plaintiff received his injuries. The liability was created by the act at the time the employee received his injuries. This Court has clearly disregarded the plain and unambiguous language of the Supreme Court of the United States in Schubert, supra, in holding that this contract does not come within Title 45, Section 55, U. S. C. A. The question is, did the contract, marked Exhibit "D" in any way limit the liability of the defendant. The order as made in the opinion dismissing the plaintiff's cause of action answers the above question in the affirmative. The opinion is, therefore, in direct conflict with Schubert, supra.

Third, the opinion quoted above is in direct conflict with Gieseking v. Litchfield & Madison Railway Co., 127 S. W.

(2d) 700, by our Supreme Court. That was a case in which the employee had accepted benefits under the Illinois Workmen's Compensation Act, and later the plaintiff sued under the Federal Employers' Liability Act. The railroad contended that the plaintiff, by accepting the compensation payments under the Illinois Act, constituted an accord and satisfaction which barred the plaintiff from prosecuting his cause of action. The Supreme Court, through Commissioner Hyde, used this language:

"Whether that is true or not is immaterial, *because we consider the amounts due from plaintiff to defendant* (payments he was not entitled to keep) *could properly be so credited* (as under the rule stated in Section 55) *regardless of the applicability of Section 55 to this situation.*"
l. c. 703

[fol. 180] The holding in the instant case that the plaintiff could not prosecute his cause of action without first making restitution of the $600.00 and the interest thereon, is clearly erroneous and in direct conflict with Giesecking, supra. The verdict of the jury, as shown in this opinion, page 10, discloses that the defendant did receive the $600.00, and $91.00 interest as a set-off against the plaintiff's judgment for damages. The verdict of the jury is as follows:

"We, the Jury, find the issues for the plaintiff and we assess his recovery at $5,691, and we further find that on such judgment the defendant is entitled to the sum of $600 principal and $91 interest, and subtracting said $691 from the said $5,691, due plaintiff, the total due plaintiff is $5,000.

(signed) C. D. Keller, Foreman."

The defendant received his principal and interest as provided under the Federal Act and cannot now complain because the judgment was so credited.

Fourth, the opinion is further erroneous and in direct conflict with the decisions of our Supreme Court, as well as the Federal decisions in using the following language:

"(Exhibit "D" the agreement signed by the plaintiff) It is, of course, a complete bar to plaintiff's cause of action if he elects to treat it so by refusing or failing to exercise his right to rescind under the terms of the agreement." (p. 18)

The payment of the $600.00, as shown by plaintiff's Exhibit "E", provides that said payment was only in "*partial payment*" for plaintiff's injuries. The defendant cannot deny that the $600.00 was made in partial settlement, and that there was a balance due the plaintiff because the unilateral agreement entered into and signed only by the Respondent recites that the plaintiff will "endeavor in good faith to adjust and settle any claim I may have for my injuries." The fraud in Exhibit "D" is in the subtle provision that the sum of $600.00 is returnable only on condition that plaintiff should decide to sue the defendant, while making no provision for a return of the money if no suit is brought. Therefore, the payment of $600.00 by the defendant at the time it was made was in part payment for the plaintiff's injuries, and the holding of the Court and [fol. 181] the language above cited is in direct conflict with the decisions of the Supreme Court of this State and the other Courts of Appeal, as well as the Federal decisions, that hold no restitution in partial settlements is necessary before suit.

The opinion, therefore, is in direct conflict with our Supreme Court in Crouch v. Quigley, 258 Mo. 651-167 S. W. 978, which holds no tender was necessary under facts as in the instant case, and used the following language:

"As an accord partially executed will not operate as a bar to a suit on the original claim, it follows that it was unnecessary for the plaintiff to tender back the $100 received by her before bringing this suit. If, as pleaded in the answer, this money was accepted as an entire satisfaction, it is a complete bar to the plaintiff's suit. If it was only a part performance of a settlement, involving the payment of more money and the execution of notes to take the place of the original cause of action, it constituted no bar."
l. c. 980

It is admitted that the $600.00 was not paid as a complete satisfaction. It was only made as a partial settlement. Both parties recognized at the time that the instrument marked Exhibit "D" was entered into, there was a balance due the plaintiff. The language quoted above, which holds that because the plaintiff did not make restitution of the $600.00, his cause of action was forever barred, is in direct conflict with the above Supreme Court decision, and in conflict with the direct provision of Title 45, Section 55, pro-

viding that the defendant shall have an off-set for any sums due and owing from the plaintiff to the defendant.

The Court of Appeals of New York had before it exactly a similar case in Larsey v. T. Hogan & Sons, 146 N. W. 430. In the language of Justice Crane, concurred in by the late Judges Cardoza and Pound, this language was used:

"As an agreement for a settlement at common law, the claim of the plaintiff would not be discharged or released until full and complete payment and execution. The agreement may have amounted to an accord, but payment only would amount to a satisfaction. Until there were an accord and satisfaction of plaintiff's claim by full and complete payment, the plaintiff was not barred from maintaining his action for negligence. Reilly v. Barrett, 220 N. Y. 170, 115 N. E. 453; Williston on Contracts, sec. 1843. To maintain this action it was unnecessary to tender back the payment made. Crouch v. Quigley, 258 Mo. 651, 167 S. W. 978."
l. c. 431

[fol. 182] The testimony of O. L. Salter clearly shows that the $600.00 advanced to the plaintiff was made in the form of a relief benefit to the plaintiff. He was asked the following question and in answer thereto, said:

"Q. Well, what did you say to Duncan about it being compensation? A. Well, that's what I'm trying to tell you, Mr. Blair. And that, since it was not a compensation that under the Federal Act we had always heretofore just taken one release, but so many employees, when they had a long disability period like he had had, of a year or more, and their debts increased and they came in, so something had to be done and this form was devised so they could help them out just as well under the Federal to tide them over until they had their recovery before we negotiate final settlement."
(p. 47)

May we assume, further, for the sake of argument, that instead of the $600.00 being paid in a lump sum that the same was to be paid at the rate of $60.00 per month until the total sum of $600.00 had been paid and carrying the provision that the monthly payments should be returned before suit could be brought. Would this Court have any hesitation in holding that such relief benefits paid the plain-

tiff did not come within the provision of Section 5 of the Act of the United States Congress of 1908. Salter testified the $600.00 was given as relief to the plaintiff. The nigger in the wood pile and the fraud in the treaty was that Salter knew plaintiff could never repay the $600.00 and the entire cause of action was therefore settled for a partial consideration of $600.00, without any pretense of taking a release for plaintiff's cause of action.

The language and holding of the opinion above quoted is also in direct conflict with the case of Hoffman v. the New York, N. H. & H. R. Co., 74 Fed. (2d) 277. This case was decided by the Second Circuit Court of Appeals. The Court said:

"This shows that acceptance of an award under the Compensation Act is a renunciation of other remedies under the state law of Connecticut, but section 5262, which provides that the Compensation Act 'shall not affect the liability of employers to employees engaged in interstate or foreign commerce,' indicates that the act afforded a remedy which had no relation to employees engaged in interstate commerce and in no way affected their rights. Accordingly the accord here was not a compromise of any right arising under the Federal Employers' Liability Act (45 USCA secs. 51-59) or depending on interstate commerce. The adjustment was only of a local liability, and the statute permitted the compromise of none other. Therefore it was no bar, if the employee was engaged in interstate commerce at the time of the accident. Larsey v. T. Hogan & Sons, 239 N. Y. 298, 146 N. E. 430, is a persuasive authority [fol. 183] under the New York Compensation Act. *The Court held that partial payments under an award in a proceeding where the commissioner had no jurisdiction were not a bar to a subsequent action to recover damages for personal injuries.*"

l. c. 231

The acceptance of the benefits by Hoffman under the Connecticut Workmen's Compensation Act did not bar him from filing suit on his cause of action arising under the Federal Act. The relief benefit of $600.00 received by the plaintiff under the above decisions could not bar the plaintiff from filing and prosecuting his suit under the Federal Act.

The case relied upon by this Court in its opinion, of

Detwiler v. Lawden, 269 N. W. 367, is not applicable, and if so, it is a case decided by the Minnesota Supreme Court and not controlling, because if the case holds, as this Court contends it does hold, it is in direct conflict with the decisions of this State, the Federal Courts, and the Supreme Court of the United States. In Detwiler, supra, the contract entered into by the employee was that he would file his case in the State in which his cause of action arose and the State in which he resided. There was no attempt by the contract entered into in Detwiler, supra, to limit and bar forever the plaintiff's cause of action, as the Court has held in the instant case. There was no provision in the Detwiler contract that the $100.00 had to be returned to the railroad before Detwiler could sue on his cause of action in his native State of Kansas. This Court has completely overlooked the underlying fraud and purpose of Exhibit "D", because it was designed in its inception to do exactly what this Court has held it could do, that is, to forever bar the plaintiff from ever filing in any Court in any State his cause of action. The defendant knew, when he gave the plaintiff the temporary relief of $600.00, that the plaintiff, who had been in the hospital for more than eighteen months and was a permanent cripple would never be able to repay the $600.00. This Court has completely overlooked and ignored the fraud and sinister purpose of such an agreement.

The opinion herein is erroneous in holding that the plaintiff should have made restitution before filing his suit, and is in direct conflict with the St. Louis Court of Appeals in Malkmous v. St. Louis Portland Cement Co., 150 Mo. App. 446-131 S. W. 148. The Court said:

[fol. 184] "As to the common law with respect to the matter of tender in the circumstances referred to, 24 Am. & Eng. Ency. Law (2d Ed.) pp. 320, 321, thus states the doctrine: 'It is sometimes said to be a general rule that one who seeks to avoid or rescind a release must restore the consideration paid therefor, or otherwise put the other party in statu quo. The plaintiff cannot be allowed both to affirm and disaffirm according as the case may terminate. He cannot affirm for what he has received, and disaffirm and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict of the jury. He must disaffirm and rescind the release in

toto. But the rule is not a general one. The true rule as gathered from the cases is that in those cases where a court of law would be authorized to declare a release void, as above set forth, a return of the consideration is not necessary; but, where the releasor would go into a court of equity to have the release set aside or annulled, he must restore to the other party the consideration received therefor. *An actual return is not necessary.* The rule is satisfied by a tender of the money when the suit is commenced, *or by its final deduction from the judgment obtained, or where the payment is a gratuity or relates to a part only of the cause of action.*"

l. c. 151

In the instant case there was a deduction of the amount due the defendant in the judgment of the court. Surely the defendant has not been prejudiced in any way. The plaintiff in the instant case tried to confess error in the trial court, because the verdict was so inadequate to compensate the plaintiff for his permanent and total disability, but the trial court refused to grant the plaintiff a new trial.

The opinion herein is further erroneous and in direct conflict with State, ex rel. v. Shain, a case decided by Division Two of our Supreme Court, 98 S. W. (2d) 597. This Division held that tender is unnecessary unless there is a release. The defendant concedes in the instant case that Exhibit "D" was not taken as a release from the plaintiff. This Court has so found, and therefore the language used, that restitution was a prerequisite to the filing of the plaintiff's suit, and that because restitution was not made before suit, the plaintiff's cause of action is barred is clearly in conflict with the language in Shain, supra, in which the Court said:

"Before the rule requiring tender before suit becomes applicable there must be a release."

l. c. 602

[fol. 185] The opinion in holding that Detwiler v. Lowden, 269 N. W. 367, is controlling in the instant case is erroneous and in direct conflict with the following decisions of the Supreme Court of Missouri and the decisions of the United States Supreme Court cited therein: Drew v. Missouri Pacific R. Co., 100 S. W. (2d) 516; Martin v. Wabash R. Co., 30 S. W. (2d) 735; Harris v. Missouri Pacific R. Co., 114 S. W. (2d) 988.

The above cases hold:

"In the application of the Federal Employers' Liability Act, we, of course, are bound by the decisions of the Supreme Court of the United States."

The opinion herein fails to follow the decisions of the Supreme Court of the United States in interpretating the application of Title 45, Section 55, U. S. C. A., to the facts in the instant case.

Wherefore, respondent prays the Court to grant a rehearing herein and to affirm the decision of the trial court in all particulars.

Respectfully submitted, Sizer & Myres, John Moberly,
Attorneys for Respondent.

IN SPRINGFIED COURT OF APPEALS

MOTION TO MODIFY OPINION—Filed December 24, 1940

Comes now the Respondent and moves the Court to modify its opinion in the following particulars, to-wit:

The opinion in stating the facts and pleadings which made up the issues in the trial court has left oat important exhibits and the Respondent's Reply to the defendant's plea in abatement, which become very pertinent for proper review of this case. The opinion sets out the petition of plaintiff on pages 1 and 2. The amended answer is recited on pages 3 and 4. The opinion then states that, "Plaintiff was permitted to dictate a general denial of the defendant's amended answer into the record" (p. 4). The Reply, as properly filed by the plaintiff, is shown in Respondent's Brief, pages 21-28 inclusive. This Reply made up the final issues in the trial court. It is in words and figures as fol- [fol. 186] lows, omitting Exhibits "D" and "E":

"Comes now the plaintiff, and in reply to defendant's plea in abatement, denies each and every allegation therein contained, and, having fully replied, asks judgment as prayed for in the petition.

Further replying to the matters set up in said plea in abatement, plaintiff alleges that his cause of action, as specifically alleged in his petition, is governed by the Federal Employers' Liability Act, as enacted by the United

States Congress, for the benefit of the plaintiff and the defendant, and all others engaged in interstate transportation; that by said act of Congress, and the amendments thereto, the purported agreement, as set out in the defendant's plea in abatement, is specifically prohibited by Section 55, page 506, of the United States Code Annotated; that said section, enacted April 22, 1908, is as follows:

"Sec. 55. Contract, Rule, Regulation, or Device Exempting from Liability; Setoff. Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought" (Apr. 22, 1908, Ch. 149, Sec. 5, 35 Stat. 66)."

That the defendant railroad, by said purported agreement, a part of which is copied in said plea, purports to prohibit the plaintiff from suing the defendant under the Federal Employers' Liability Act, that the plaintiff admits that he did receive the sum of $600 from the defendant, no part of which has been returned to the defendant, and the plaintiff further states that said sum of money was received by him not as a release of any cause of action which he might have, but only as part payment in settlement for injuries received while in the employ of the defendant.

That said purported agreement which was not signed by the defendant, or any of his agents, servants, or employees, or anyone else in authority, was procured by fraud practiced on plaintiff by defendant, as herein set out, and plaintiff's name was procured to said instrument as a receipt for the partial payment of his injuries.

That the plaintiff received said sum of money from the defendant as a partial payment of compensation for his injuries; that said money, when paid by the defendant to the plaintiff, was fraudulently represented to the plaintiff by the defendant, his agents, servants, and employees, as being part payment for the compensation due the plaintiff under the Missouri Workmen's Compensation Act; that

at the time said payment was received by the plaintiff, he was informed by the defendant, his agents, servants and employees that any cause of action which he had was gov- [fol. 187] erned by said Missouri Workmen's Compensation Act, and that his injuries came thereunder, and by the statutory provisions, as made in said act, the plaintiff would be entitled to further compensation by reason of his disability; that the defendant, his agents, servants, and employees fraudulently represented to the plaintiff that there was approximately due and owing the plaintiff, at the time the plaintiff received said money, the sum of $600, under the Workmen's Compensation Act of the State of Missouri.

That at the time said money was paid, the defendant, his agents, servants, and employees informed this plaintiff that there was and would be a larger sum due the plaintiff than the sum of $600 for his permanent injuries; that the defendant further fraudulently represented to the plaintiff that he would honestly and earnestly try to make a settlement which would adequately compensate the plaintiff for his injuries, and the disability which, at that time, was undetermined; that plaintiff relied upon said representations, and believed them to be true, and the plaintiff did, over a long period of time, to-wit, several months, negotiate with the defendant, his agents, servants, and employees, and did honestly and truly try to make an amicable settlement with the defendant and tried to get the defendant to pay the plaintiff a sum of money which would fairly compensate him for his disability and his injuries; that the defendant, his agents, servants and employees not only failed to perform their agreement to negotiate an amicable settlement, but refused to try to negotiate settlement with the plaintiff, and told the plaintiff that he would have to accept said $600 in full settlement of his claim, or return said sum of money to the defendant before he could sue, as the defendant had never signed any agreement to arbitrate or adjust his injuries.

Plaintiff further alleges and states that his signature upon said agreement was obtained by fraud and trickery of the defendant, his agents, servants, and employees in said particulars, and by further, withholding from this plaintiff defendant's superior knowledge as to the law and the facts governing and controlling the accident on April 10, 1936; that the defendant, his agents, servants, and em-

ployees knew that said accident and resulting injuries, and any cause of action which the plaintiff had, was governed by the Federal Employers' Liability Act, and not governed by the Missouri Workmen's Compensation Law, as they falsely represented to plaintiff; that defendant knew that plaintiff did not know his cause of action was governed by the Missouri Workmen's Compensation Act, or the Federal Employers' Liability Act.

That defendant further fraudulently represented that by said compensation statute, plaintiff was given so many weeks of disability, and by reason thereof, was entitled to so much compensation per week, which was greatly in excess of $600, and that the defendant was paying the plaintiff for the weeks which had already accrued by reason of such disability.

Plaintiff further states that he relied upon said statements of the agents, servants, and employees of the defendant, and believed said statements to be true; that said statements, when made, were false and were made for the purpose of deceiving the plaintiff, and getting the plaintiff to sign said agreement, when the defendant, his agents, servants, and employees knew that said agreement was prohibited by the statutes of the United States Congress, and knew that the plaintiff's claim was not governed by the [fol. 188] Missouri Workmen's Compensation Act, but was under the Federal Employers' Liability Act; that had the true facts been stated to the plaintiff by the defendant, his agents, servants, and employees, he would not have signed said instrument which was procured by trickery and fraudulent representations, as herein alleged.

Plaintiff further alleges that the instrument he signed was not an agreement as alleged and relied upon by the defendant, but as a matter of fact, it is only a receipt for $600 which receipt is attached to the bottom of the recital of what is purported to be an 'agreement,' and in fact neither the plaintiff nor the defendant ever signed the purported 'agreement,' as will be shown by the terms of said purported 'agreement' and receipt, as below set out in haec verba:

(Agreement set out in full - designated Defendant's Exhibit 'D' in appellant's abstract.)

That when plaintiff was requested to sign said instrument, he saw printed in the receipt attached below the

purported agreement, these words: 'In full for the above account'; that before signing the receipt, the plaintiff inquired of the defendant's claim agent Salter if those words meant that he was making a full settlement, and said claim agent informed plaintiff that the instrument was only a receipt for the $600 as partial settlement and that the check or draft he was getting would so show; that the claim agent then and there made out the draft for the $600 and showed it to plaintiff, and when plaintiff saw that the draft specified a 'partial settlement,' plaintiff signed the receipt, as requested by the claim agent.

Said draft for said partial settlement is set out below in words and figures as follows:

(Draft set out here—designated Defendant's Exhibit 'E' in appellant's abstract.)

Plaintiff further states that the defendant knew at the time of the execution of said receipt plaintiff was seriously and permanently crippled and that said partial settlement was made solely for the purpose of using the money for his own injuries and that of an afflicted wife; that plaintiff has spent all of such funds therefor, and has no other means and no other property with which to repay the defendant; that all of said facts were known to the defendant, when he refused to negotiate with plaintiff and refused to make further payments. Plaintiff hereby offers to credit the defendant with said sum of $600 with interest thereon at six per cent (6%) from day of payment thereof, as against any judgment plaintiff may recover against the defendant according to the terms of the Federal Employers' Liability Act.

Plaintiff denies that he assumed the risks or was guilty of any negligence which contributed to his injuries.

Having fully replied, plaintiff asks the court to submit the issues raised herein to a jury, and that plaintiff have judgment as prayed in his petition."

[fol. 189] The respondent urgently requests that this Court modify its opinion and add thereto the above reply or so much thereof as to correctly set out the issue of fraud as made in the trial court.

The respondent further moves this Court to set out in full Exhibit "D" which is the agreement pleaded as a bar to plaintiff's action, and is in words and figures as follows:

"On or about April 10th, 1936, while employed as Roundhouse Laborer at or near Nevada, Missouri, I was injured in the following manner: While working on and about engine No. 1429, I fell from the running board of this locomotive into the turntable pit and was then and thereby injured.

I have this day received from the Trustee of the Missouri Pacific $600.00 Railroad Company the sum of $600.00, and also the additional sum of $—. I sustained personal injuries in an accident as above set forth, the effect and extent of which are uncertain. Both of said sums are paid to me at my request for living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of my claim against said Trustee for said injuries.

I agree that the payment of said sums of money to me shall not be considered as an admission of any liability on the part of said Trustee or the Railroad Company and I understand that the Trustee and the Railroad Company deny liability for my injuries.

In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit. In consideration of said payment of $600.00, I covenant and agree with said Trustee and his successors that I will not commence suit against him, or them, or the Railroad Company, to recover damages for my said injuries in any courts except those sitting within the State where my injuries were sustained, or within the State where I resided at the time my injuries were sustained, and I covenant that I will not bring any such suit in any other court.

It is further agreed that the aforesaid sums of $600.00 and $— are the sole considerations for the respective agreements therein; that said considerations are contractual and not mere recitals; that no representations or promises of any kind or character, not specified herein, have been made to induce the execution of this agreement or with reference thereto, or the matters and facts above mentioned; that in executing this agreement it is agreed that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries as well as the liability

questions involved, and that I have not been influenced to any extent whatever by any statements regarding said injuries or regarding liability or any other matters made by said Trustee or by any other person or persons representing or acting for him, or by any physician or surgeon by him [fol. 190] employed; and that all agreements and understandings between the parties above named or hereinbefore referred to are embodied and expressed herein.

Approved for Payment (Signed) T. M. Niven, General Auditor. CBM.

Audited: (Signed) C. B. Moon, Auditor Disbursements.

Received St. Louis, Missouri, August 13th, 1937 Guy A. Thompson, Trustee, of Missouri Pacific Railroad Company Debtor.

——Six Hundred and No/100——Dollars in Full For The Above Account. (Signe here) (Signed) Barker Duncan.

Witness: (Signed) O. L. Salter

Witness: (Signed) R. C. Wolfe."

The rights of the p rties are determined by this instrument, and to properly review this opinion on writ of certiorari should either party have to resort to this extraordinary remedy the above exhibit "D" should in fairness to all parties be made a part of the opinion.

The $600.00 draft or check, marked Exhibit "E" is also omitted from the opinion. It is as follows:

"(Photostatic copy of draft, marked on the back 'Ex. 3, W. A. S.')

200 bks—50 Sets—1-28——W. Form 42-b.

Trustee Account

Missouri Pacific Railroad Company

Office of Claims Attorney

(facsimile of seal:)

Missouri
Pacific
Lines

No Protest

Dated at St. Louis, Mo., August 13th, 1937 No. B 1736

At sight, pay to the order of Baker Duncan —Six Hundred and No/100— Dollars, account of partial payment in

settlement for injuries sustained on or about April 10th, 1936 at Nevada, Missouri, when employed as a Roundhouse Laborer.

(Signed) O. L. Salter, Claim Agent.

To W. J. Wright, Local Treasurer
Missouri Pacific Railroad Company
St. Louis, Mo.

(Copy of back of draft as follows:)

Endorsed on top as follows: Barker Duncan Hurlbut Cnd Co Newell G Hurlbut V. P."

[fol. 191] This Exhibit clearly shows in unambiguous language that the $600.00 was made only "of *partial payment* in settlement for injuries sustained on or about April 10th, 1936." The reciting by Exhibit "E" that the sum of Six Hundred Dollars was only in partial payment of the Respondent's cause of action makes said Exhibit very important and it should have *have* been set out haec verba in this opinion.

The Respondent moves this Court to modify its opinion for the further reason that the holding "that plaintiff's suit was prematurely brought and must be, and is, reversed with directions to the Trial Court to dismiss plaintiff's suit and render judgment for the defendant," is contrary to and in violation of the Supreme Court decisions of Missouri and the Supreme Court of the United States, as set out, supra, in Respondent's motion for rehearing.

This Court recognizes that the plaintiff's cause of action was not discharged or barred by executing the instrument marked Exhibit "D", and used the following language on page 18 of the opinion: "It does not finally bar the cause of action, *but only suspends it until restitution is made*; in the instant case it is a dilatory plea barring only the right of the plaintiff to maintain this particular suit, *and not his cause of action.*" The appellant even does not contend that the instrument is a complete bar to the plaintiff's cause of action. Therefore, the opinion of this Court should at least be modified to the extent that the plaintiff's suit be remanded for a new trial, and plaintiff given a reasonable time to tender to the defendant, or deposit with the court clerk, the $600.00 and interest.

If this opinion is filed and the mandate carried out, plaintiff could not then tender the $600.00 and file a new suit,

because, Section 874, R. S. of Missouri, 1929, the one year saving statute, would not aid the plaintiff, even though he should make restitution of the money received and the interest thereon. The Eighth Circuit Court of Appeals passed directly upon this question in Bell v. Wabash R. Co., 58 Fed. (2d) 569, and in the opinion Judge Kenyon held that the "Missouri statutes providing that, if plaintiff commences suit within the time fixed by law, and afterward suffers a non-suit, he may commence a new suit within [fol. 192] one year from the date he suffers such non-suit, but surely it would not be contended that a state statute could extend the period of limitations fixed by the Federal Employers' Liability Act." The plaintiff was injured on April 10, 1936, and the two year statute of limitations then in force has long since run and any new suit which the plaintiff would be forced to file under the opinion of this Court, as it now stands, would be barred under the holding of the above decision, and the two year limitation placed on the plaintiff's cause of action by the Federal Employers' Liability Act would be burnt powder.

In fairness to this plaintiff, the court's opinion should at least be modified, so as to give the plaintiff an opportunity to make restitution to this defendant and proceed with his cause of action, as now filed. If the court should refuse to amend the opinion as requested above, the effect of such holding will be to prohibit the plaintiff from ever filing another suit in the instant case, even though this court has held that the plaintiff's cause of action was not extinguished by the acceptance of the $600.00, which we contend contravenes the federal statutes and Federal decisions and the decisions of the Supreme Court of Missouri.

The respondent earnestly contends that the motion for rehearing as filed in this cause, should be sustained and the plaintiff's judgment affirmed, and this request that the opinion be modified in the above particulars is made only in case that said motion for rehearing is overruled, which would give the plaintiff, under such modification, the right to proceed in his present cause of action now pending in the Circuit Court of Texas County, provided he tendered the $600.00 and interest thereon, or deposited the same with the Court Clerk.

Wherefore, the Respondent moves this Court to modify its opinion in the above respects that the plaintiff's cause of action be dismissed only in case that restitution or tender

in full is not made by the plaintiff by a given time to be set by the Court in the exercise of its sound discretion. In making the above request to modify, the Respondent does so firmly, believing that his motion for rehearing should be sustained in all particulars.

Respectfully submitted, John Moberly, Sizer & Myres, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 193] IN SPRINGFIELD COURT OF APPEALS

ORDER OVERRULING MOTION FOR REHEARING, ETC.—December 31, 1940

Now at this day, the Court having fully considered the respondent's Motion for Rehearing and to Modify in the above entitled cause, doth overrule the same. Opinion filed.

[fol. 194] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

OPINION ON MOTION FOR REHEARING—Filed December 31, 1940

The respondent's motion for a rehearing requests us to copy in full Exhibit "D", which is the contract of settlement. This request is no doubt made for the reason that respondent has some doubt whether the exhibit would be available to him on an application for a writ of certiorari. While this doubt is entirely unfounded, on account of the unique character of the contract, we have concluded to grant his request. It is as follows:

"Plaintiff's Exhibit D

3-37—1M-X

(Pltff's. Ex. D. 3/7/40 A. L. F.)

(Photostatic copy of Agreement, marked Ex. 2, W. A. S.:)

Form 7606
(facsimile of seal:)

Missouri
Pacific
Lines

Guy A. Thompson, Trustee
Missouri Pacific Railroad Company, Debtor.
To Barker Duncan, 529 East Allison Street, Dr.
Nevada, Missouri. (Superscribed stamp:) Paid
By Draft Audit No. 669 Month of August 1937
Paid by Draft No. B-1736

Agreement

On or about April 10th, 1936, while employed as Roundhouse Laborer at or near Nevada, Missouri, I was injured in the following manner: while working on and about engine No. 1429, I fell from the running board of this locomotive into the turntable pit and was then and thereby injured.

I have this day received from the Trustee of the Missouri Pacific $600.00 Railroad Company the sum of $600.00, and also the additional sum of $———. I sustained personal injuries in an accident as above set forth, the effects and extent of which are uncertain. Both of said sums are paid to me at my request for living and other expenses pending [fol. 195] further developments as to the extent and effect of said injuries and negotiations for settlement of my claim against said Trustee for said injuries.

I agree that the payment of said sums of money to me shall not be considered as an admission of any liability on the part of said Trustee or the Railroad Company and I understand that the Trustee and the Railroad Company deny liability for my injuries.

In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not

so adjusted, and I elect to bring suit, I will first return the said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit. In consideration of said payment of $600.00, I covenant and agree with said Trustee and his successors that I will not commence suit against him, or them, or the Railroad Company, to recover damages for my said injuries in any courts except those sitting within the State where my injuries were sustained, or within the State where I resided at the time my injuries were sustained, and I covenant that I will not bring any such suit in any other court.

It is further agreed that the aforesaid sums of $600.00 and $——— are the sole considerations for the respective agreements herein; that said considerations are contractual and not mere recitals; that no representations or promises of any kind or character, not specified herein, have been made to induce the execution of this agreement or with reference thereto, or the matters and facts above mentioned; that in executing this agreement it is agreed that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries as well as the liability questions involved, and that I have not been influenced to any extent whatever by any statements regarding said injuries or regarding liability or any other matters made by said Trustee or by any other person or persons representing or acting for him, or by any physician or surgeon by him employed; and that all agreements and understandings between the parties above named or hereinbefore referred to are embodied and expressed herein.

Approved for Payment
(Signed) T. M. Niven
General Auditor
CBM

Audited:
(Signed) C. B. Moon
Auditor Disbursements.

Received St. Louis, Missouri, August 13th, 1937 Guy A. Thompson, Trustee, of Missouri Pacific Railroad Company Debtor.

——— Six Hundred and No/100 ———
Dollars in Full for The Above Account.

(Sign here) (Signed) Barker Duncan
Witness: (Signed) O. L. Salter
Witness: (Signed) R. C. Wolfe "

[fol. 196] The sight draft contains the following:

"At sight, pay to the order of Barker Duncan Six Hundred and No/100 Dollars, account of partial payment in settlement for injuries sustained on or about April 10th, 1936, at Nevada, Missouri, when employed as a Roundhouse Laborer."

The motion also complains of the statement in the opinion with reference to the replication being a general denial. The statement was taken from appellant's abstract, which does not contain the replication. The respondent filed an additional abstract, which does not contain the replication. Respondent also filed a motion to dismiss the appeal and suggestions in support thereof. In respondent's argument in support of his motion he does set forth what purports to be the replication. It is unnecessarily lengthy and attempts to plead fraud.

Inasmuch as we overruled his motion to dismiss the appeal and held that any defects in the abstract were covered by respondent's supplemental abstract, we have concluded to treat the replication contained in his argument as a part of the record proper as if it had been included in his supplemental abstract instead of in his argument to support his motion. The substance of the replication is as follows:

"That said purported agreement which was not signed by the defendant, or any of his agents, servants, or employees, or anyone else in authority, was procured by fraud practiced on plaintiff by defendant, as herein set out, and plaintiff's name was procured to said instrument as a receipt for the partial payment of his injuries.

" * * *; that at the time said payment was received by the plaintiff, he was informed by the defendant, his agents, servants, and employees that any cause of action which he had was governed by said Missouri Workmen's Compensation Act, and that his injuries came thereunder, and by the statutory provisions, as made in said act, the plaintiff would be entitled to further compensation by reason of his disability; that the defendant, his agents, servants, and employees fraudulently represented to the plaintiff that there was approximately due and owing the plaintiff, at the time the plaintiff received said money, the

sum of $600, under the Workmen's Compensation Act of the State of Missouri.

[fol. 197] "That at the time said money was paid, the defendant, his agents, servants and employees informed this plaintiff that there was and would be a larger sum due the plaintiff * * *; that plaintiff relied upon said representations, and believed them to be true, and the plaintiff did, over a long period of time, to-wit, several months, negotiate with the defendant, his agents, servants, and employees, and did honestly and truly try to make an amicable settlement with the defendant and tried to get the defendant to pay the plaintiff a sum of money which would fairly compensate him for his disability and his injuries; that the defendant, his agents, servants, and employees not only failed to perform their agreement to negotiate an amicable settlement, but refused to try to negotiate settlement with the plaintiff, and told the plaintiff that he would have to accept said $600 in full settlement of his claim, or return said sum of money to the defendant before he could sue, as the defendant had never signed any agreement to arbitrate or adjust his injuries.

"* * * that his signature upon said agreement was obtained by fraud and trickery of the defendant, his agents, servants, and employees in said particulars, and by further withholding from this plaintiff defendant's superior knowledge as to the law and the facts governing and controlling the accident on April 10, 1936; * * *."

The fraud now relied upon in respondent's motion for a rehearing, is:

"* * *. The nigger in the wood pile and the fraud in the treaty was that Salter knew plaintiff could never repay the $600.00 and the entire cause of action was therefore settled for a partial consideration of $600.00, without any pretense of taking a release for plaintiff's cause of action.

* * * * * * *

"* * *. This Court has completely overlooked the underlying fraud and purpose of Exhibit 'D', because it was designed in its inception to do exactly what this Court has held it could do, that is, to forever bar the plaintiff from ever filing in any Court in any State his cause of action. The defendant knew, when he gave the plaintiff the temporary

relief of $600.00, that the plaintiff, who had been in the hospital for more than eighteen months and was a permanent cripple would never be able to repay the $600.00. This Court has completely overlooked and ignored the fraud and sinister purpose of such an agreement."

Observe that the fraud attempted to be alleged in respondent's replication is entirely different from the alleged fraud relied upon in his motion for a rehearing. There is no [fol. 198] allegation in the replication that the defendant knew that the plaintiff would never be able to repay the $600.00 as provided in the contract if he desired to assert his cause of action for damages. Such an allegation would have been wholly insufficient to avoid the contract of settlement in the absence of a plea that the plaintiff lacked mental capacity to enter into such a contract—in other words, was resting under disability. The proof of such knowledge on the part of the defendant would no doubt have been admissible under such a plea of disability. It is perfectly evident that the contract of settlement contemplates that if the parties were thereafter able to agree upon a larger sum, in order to prevent the plaintiff from exercising his privilege of rescinding the agreement, that the $600.00 was to be treated as a partial payment of the total amount thereafter agreed upon. But, in the absence of such subsequent agreement, it is perfectly plain, beyond the possibility of a remote doubt, that, before the plaintiff could maintain a suit, he was required to return to the defendant the $600.00; if returned, then of course it was not a partial payment in settlement of plaintiff's claim. If it was returned, then there was no settlement and the matter stood just as if the contract had never been entered into. The contract plainly provides:

"I agree that the payment of said sums of money to me shall not be considered as an admission of any liability on the part of said Trustee or the Railroad Company and I understand that the Trustee and the Railroad Company deny liability for my injuries.

" * * *, I agree that if my claim is not so adjusted and I elect to bring suit, I will first return the said sum of $600.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit. * * *."

This language is perfectly plain and unambiguous. No one who could read, possessing ordinary intelligence,

[fol. 199] not resting under total disability, could possibly misunderstand or misconstrue it. As heretofore stated, the replication expressly says that, before the suit was brought, the defendant had told the plaintiff he would have to accept the $600.00 in full settlement of his claim or return the said sum of money to the defendant before he could sue. With this information, which the replication admits the plaintiff had, and with advice of counsel, he deliberately and intentionally refused to abide by his contract and elected to frame his case on the theory that the contract was void under Section 55 of the Federal Employer's Liability Act, and, unless the contract can be brought within that Act (which, in our judgment, it clearly cannot be for the reasons set forth in our original opinion), or, unless the plaintiff can show the contract is not merely voidable but is absolutely void under the Missouri decisions because of fraud in the factum instead of fraud in the treaty, there is no possible escape from the conclusion that the failure of the plaintiff to return to the defendant the $600.00 before filing his suit constitutes an insuperable obstacle to the plaintiff's recovery. So long as the plaintiff held on to the $600.00 and refused to return it to the defendant, the contract was a complete accord and satisfaction—as much so as if there was no provision authorizing the plaintiff to rescind the agreement by returning the $600.00. Under an implicit provision of the contract the plaintiff could only bring a suit by returning to the defendant the $600.00 and this is made a prerequisite to the filing and maintenance of the suit. If the plaintiff failed to return the $600.00 he could not maintain his suit. Such failure constituted a complete bar. This means, and can only mean, that the failure to return the $600.00 before bringing the suit, constituted a complete accord and satisfaction. This conclusion is as self [fol. 200] evident as it is that the shortest distance between given points is a straight line. In the plaintiff's motion for a rehearing he cites a recent case from our Supreme Court, a case from the Federal Court of Appeals of the Second Circuit, and a New York case, which cases he claims hold that the failure to return the $600.00 under the express terms of the contract does not constitute an accord and satisfaction. A consideration of these cases conclusively shows, to our mind at least, that, so far as they are applicable, their holding is directly to the contrary. The

Missouri case is Gieseking v. Litchfield & Madison Ry. Co., 127 S. W. (2d) 700. The facts in that case were:

"In this case, plaintiff made no application, defendant gave the notice of his injuries to Illinois Industrial Commission, voluntarily made all payments direct to him, and reported these to the Commission. The final report contained the following: 'Was there an arbitration? No. Was there a review? No. Was there a settlement contract? No. Was there a lump sum settlement? No.'

"The report also stated that the payments were made for a certain number of weeks 'for temporary total disability.' While this report also contained a final receipt, it was stated therein that plaintiff received 'the total sum of One Hundred Fifty Nine dollars and Sixty cents ($159.60), in full settlement of compensation under the provisions of the Illinois Workmen's Compensation Act, for injuries received by me, William H. Gieseking on or about the 16th day of July, 1931, while in the employ of Litchfield & Madison Railway Company, subject to review by the Industrial Commission.' It would seem unreasonable to construe this transaction as a full settlement and release for permanent injuries sustained by plaintiff while engaged in interstate transportation. The United States Circuit Court of Appeals (Second Circuit) has recently held that a similar agreement for compensation was not an accord and satisfaction and did not bar an action under the Federal Act. Hoffman v. New York, N. H. & H. R. Co., 2 Cir., 74 F. 2d 227, certiorari denied 294 U. S. 715, 55 S. Ct. 513, 79 L. Ed. 1248. We will follow this decision and adhere to our former ruling." (127 S. W. (2d) l. c. 702, 703).

The principle there announced is that, under the facts in that case, $159.60 was paid under a mutual mistake of fact by the parties that the Illinois Industrial Commission Act applied, when, as a matter of fact, it had no application. [fol. 201] Under that state of facts there would, of course, be an implied obligation on the part of the plaintiff in that case to return to the defendant the $159.60 because it was paid under a mistake of fact. The implied obligation to return the money would exist whether the plaintiff did or did not assert his common law cause of action. The defendant could enforce this obligation either by an original action or a counter-claim or set-off, but it could not treat it as an accord and satisfaction because it was not given

in settlement of plaintiff's common law cause of action, but only in settlement of temporary total disability under the Illinois Industrial Commission Act. The failure to return, nothing more appearing, would not justify, by implication, the conclusion contrary to the express provision of the receipt that the $159.60 was received in full settlement and discharge of his common law cause of action that, in fact, existed, instead of for temporary total disability under the Industrial Commission Act, for which it was paid under a mistaken belief, apparently by both parties, that the act applied. There can be no obligation created by implication contrary to an express provision of a contract. In the instant case it was not a question of implication but, under the express provisions of the contract, the $600.00 was to be returned to the defendant as a condition precedent to the right of the plaintiff to maintain a common law suit. That case, instead of sustaining the plaintiff's contention in the instant case, the principle underlying the decision forces the inevitable conclusion in the instant case that the plaintiff's failure to return the $600.00 constituted a complete accord and satisfaction. This is made even more manifest, if possible, by the case of Hoffman v. New York, etc., supra., which the Gieseking case follows. In the Hoffman case, the court says:

"This shows that acceptance of an award under the Compensation Act is a renunciation of other remedies under the [fol. 202] state law of Connecticut, but section 5262, which provides that the Compensation Act 'shall not affect the liability of employers to employees engaged in interstate or foreign commerce,' indicates that the act afforded a remedy which had no relation to employees engaged in interstate commerce and in no way affected their rights. Accordingly the accord here was not a compromise of any right arising under the Federal Employers' Liability Act (45 U. S. C. A. secs. 51-59) or depending on interstate commerce. The adjustment was only of a local liability, and the statute permitted the compromise of none other. Therefore it was no bar, if the employee was engaged in interstate commerce at the time of the accident. Larsey v. T. Hogan & Sons, 239 N. Y. 298, 146 N. E. 430, is a persuasive authority under the New York Compensation Act. The court held that partial payments under an award in a proceeding where the commissioner had no jurisdiction were

not a bar to a subsequent action to recover damages for personal injuries." (74 F. (2d) l. c. 231).

In the New York case of Larsey v. T. Hogan & Sons, 239 N. Y. 298, 146 N. E. 430, the facts were:

"The employer paid to the plaintiff the sum of $300, and apparently was willing to pay the balance, about $420, but the employee refused to receive it, in view of the decision on May 17, 1920, of the United States Supreme Court in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, holding that the Workmen's Compensation Law was without jurisdiction in a case like this. The plaintiff thereupon brought this action to recover his damages for negligence." (146 N. E. l. c. 431).

The court held, under an elementary rule, that the payments constituted no bar for the reason, as stated by the court:

"As an agreement for a settlement at common law, the claim of the plaintiff would not be discharged or released until full and complete payment and execution. The agreement may have amounted to an accord, but payment only would amount to a satisfaction. Until there were an accord and satisfaction of plaintiff's claim by full and complete payment, the plaintiff was not barred from maintaining his action for negligence. Reilly v. Barrett, 220 N. Y. 170, 115 N. E. 453; * * *." (146 N. E. l. c. 431).

The Larsey case supra cites a recent New York case, Brassel v. Electric Welding Co. of America, 239 N. Y. 78, 145 N. E. 745, wherein it was held that the receipt and retention of compensation under the facts of that case constituted an accord and satisfaction. The court, speaking through Judge Cardozo, says:

[fol. 203] "The trial judge held that the State Industrial Board was without jurisdiction, since the injuries were suffered on navigable waters. Danielsen v. Morse Dry Dock & Repair Co., 235 N. Y. 439, 139 N. E. 567. From this he drew the conclusion, not merely that the award was void, but that its collection and retention did not affect the right of action, except to require the jury to credit the $240 upon the damages sustained. A verdict for $1,600 followed these instructions.

"We think the acceptance of the payment has destroyed the right of action. The question is not whether the award has the effect of a binding adjudication. * * *. The question is whether a right of action has survived the collection of the award and the retention of the proceeds. The plaintiff made claim under the statute and must be charged with knowledge of its provisions. The statute provides (Workmen's Compensation Act (Consol. Laws, c. 67) sec. 11) that the liability of an employer thereunder shall be 'exclusive and in place of any other liability whatsoever' on account of the injury sustained by the employee. In the light of this provision, the employer, when it tendered payment of the award, affixed by implication the condition that the tender was made upon the statutory terms. The employee, by accepting payment, signified his assent to the condition, and his willingness to receive the money upon the terms thereby imposed. * * *.

"* * *. He may not litigate his claim for damages while clinging to the fruits of the contract which he affects to disaffirm." (145 N. E. l. c. 746).

That case is directly in point in the instant case. The only difference is that there it was an implied contract. In the instant case the plaintiff received the $600.00 under the express unambiguous contract that he could not sue on his common law cause of action without returning the $600.00 to the defendant, and the return is made a condition precedent to the right to bring such a suit. Under such a contract he may not litigate his claim "while clinging to the fruits of the contract which he affects to disaffirm". In the instant case he seeks to disaffirm it, not in accordance with its express terms but in violation thereof, by giving the defendant credit for the $600.00 if he recovers a larger sum. If he fails to recover, then he seeks to retain the $600.00 as an accord and satisfaction of his cause of action. He does [fol. 204] this on the novel theory that the contract, contrary to its terms, was only a partial settlement. In the first place, there is no such thing as a partial settlement. It is either a settlement or it is not a settlement. There is, of course, such a thing as a partial payment on a full settlement. Such partial payment, under elementary law, does not constitute an accord and satisfaction. It constitutes only an accord but it requires full satisfaction in order to bar his cause of action.

In the respondent's motion for a new trial he calls our attention to the case of Bell v. Wabash Ry. Co., 58 Fed. (2d) 569, which holds that a new suit cannot now be brought even if he tenders to the defendant the $600.00 before doing so, for the reason that Section 874 R. S. 1929, has no application and cannot extend the statute of limitations, and insists that this court should reverse the case and remand it for a new trial upon the tender by plaintiff to defendant of the $600.00. It is perfectly apparent that this court has no power to do so. The question of whether he can bring a new suit is not before us and we do not attempt to decide the question, but whether he can or not, we certainly have no power to disregard the contract between the parties and the law applicable thereto by permitting the respondent to tender the $600.00 after the suit was brought and not before as the contract expressly requires him to do. In other words, what he asks is that we disregard the fact that there is an accord and satisfaction and permit him to rescind his contract. We have no such power, however much we might desire to do so. In addition to this, his request is in conflict with his contention now urged that the defendant knew when the contract was entered into that the plaintiff would never be able to return the $600.00. The request at least implies that he is now able to return it and, if so, it is fairly inferable at least that he was able [fol. 205] to return it before bringing the suit. In our judgment there is no possible escape from the conclusion that the plaintiff cannot maintain this suit unless the contract of settlement is covered by Section 55 of the Federal Employer's Liability Act, which we do not think it is, or unless the contract was procured by fraud in the factum and not in the treaty within the Missouri decisions. We do not think there is any fraud shown, but if there was it undoubtedly relates to the terms of the contract and its meaning, and not to the procuring of the signature to the contract. His replication expressly admits that before suit was brought, and apparently several months before, he had been definitely informed by the defendant that he either had to return the $600.00 or forego bringing his suit, and after receiving advice of counsel he elected to bring his suit on the theory that it was covered by the Federal Employers Liability Act.

The motion for a rehearing should be and is denied.

W. D. Tatlow, Presiding Judge.

Smith, J., Concurs, Fulbright, J., Concurs.

[fol. 206] And thereafter on the 8th day of January, 1941, respondent's attorneys duly notified the Springfield Court of Appeals of their intention to apply for a writ of certiorari to the Supreme Court of Missouri.

* * * * * * *

[fol. 207] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

APPLICATION FOR STAY OF MANDATE—Filed February 4, 1941

To the Honorable, The Springfield Court of Appeals:

Comes now the Respondent, Barker Duncan, and moves the Court to enter an order withholding the mandate in this cause, because of the bona fide intention of the Respondent to make proper application to the Supreme Court of the United States for writ of certiorari in this cause within the next ninety days, and in support thereof Respondent attaches the professional statement of his counsel, Wm. J. B. Myres.

I hereby certify that it is the bona fide intention of the Respondent, Barker Duncan, to make application to the Supreme Court of the United States for writ of certiorari in the above entitled cause, and that I believe there is merit in Respondent's case.

Respectfully, Wm. J. B. Myres, Sizer & Myres, Monett, Missouri; John Moberly, Houston, Missouri, Attorneys for Respondent.

[fol. 208] AFFIDAVIT

STATE OF MISSOURI,
County of Barry, ss:

Wm. J. B. Myres, being first duly sworn upon his oath, deposes and says:

That he has, on this the 3rd day of February, 1941, mailed a copy of this Application for Stay of Mandate to

Messrs. McReynolds & Flanigan, Attorneys at Law, Carthage, Missouri, who represents the Appellants.

Further the Affiant saith nothing.

(Signed) Wm. J. B. Myres.

Subscribed and sworn to before me this 3 day of February, 1941. (Signed) Edward V. Sweeney, Notary Public. My Commission expires: Aug. 24, 1944. (Seal.)

[fol. 209] And that on the 12th day of February, 1941, there was received from the Supreme Court of the State of Missouri a mandate denying certiorari in this cause, a copy of which is in words and figures following, to-wit:

[fol. 210] FILED—February 13, 1941

Guy Webb, Clerk.

IN SUPREME COURT OF MISSOURI

September Term, 1940.

STATE OF MISSOURI, at the relation of Barker Duncan, Relator,

v.

(W. D. TATLOW,) DAVID E. BLAIR, ROBERT J. SMITH and James Fulbright, Judges of the Springfield Court of Appeals, Respondents

Certiorari

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—February 1, 1941

Now at this day, on consideration of the petition for a writ of certiorari herein to the said respondents, it is ordered by the court here that the said petition be, and the same is hereby denied.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 211] In Springfield Court of Appeals

Order Staying Mandate—February 11, 1941

Now comes respondent and having heretofore filed his motion to withhold the mandate in this cause said motion is now taken up and being by the Court seen, heard and fully understood, the same is hereby sustained.

It is therefore ordered by the Court that the mandate herein be and the same is hereby ordered withheld for a period of ninety days, pending the filing of a petition for a writ of certiorari in the Supreme Court of the United States.

[fol. 212] Clerk's Certificate to foregoing transcript omitted in printing.

[fol.213] Caption omitted.

[fol. 214] In Supreme Court of Missouri

May Term, 1941

State of Missouri ex rel. Barker Duncan, Relator,

vs.

W. D. Tatlow, then presiding Judge since succeeded by David E. Blair, Robert J. Smith, and James F. Fulbright, Respondents

Notice of Petition for Writ of Certiorari—Filed January 28, 1941

To the Honorable W. D. Tatlow, then presiding Judge since succeeded by David E. Blair, Robert J. Smith, James F. Fulbright, Judges of the Springfield Court of Appeals, and Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, and McReynolds & Flanigan, his Attorneys of record:

Please take notice that on the 30th day of January, 1941, the undersigned will file in the Supreme Court of Missouri, at Jefferson City, his petition for writ of certiorari to

quash the opinion and judgment of the Springfield Court of Appeals in the case of Barker Duncan, Respondent, vs. Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant, Case No. 6194, together with Suggestions and Exhibits in support thereof, true copies of the Opinion and Supplemental Opinion of [fol. 215] the Springfield Court of Appeals, Motion for Rehearing, and Order denying said motion, copies of which are hereto attached and made a part of this Notice.

Barker Duncan, Relator. Sizer & Myres, Attorneys for Relator.

Service of the foregoing Notice and receipt of copy thereof and Petition for Writ of Certiorari and exhibits thereto attached are hereby acknowledged this 24 day of January, 1941.

D. E. Blair, P. J., Robert J. Smith, James F. Fulbright, Judges of the Springfield Court of Appeals, by Guy Webb, Clerk, Springfield Court of Appeals. T. J. Cole & McReynolds & Flanigan, Attorneys for Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation. (Seal.)

[fol. 216] IN SUPREME COURT OF MISSOURI

PETITION FOR WRIT OF CERTIORARI—Filed January 28, 1941

To the Honorable Judges of the Supreme Court of Missouri:

Your Relator respectfully states that the Respondents, W. D. Tatlow, then presiding Judge since succeeded by David E. Blair, Robert J. Smith, and James F. Fulbright, are the Judges of the Springfield Court of Appeals; that during the October 1940 Term of said Court, there was pending therein an action entitled "Barker Duncan, Respondent, vs. Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant, No. 6194," to recover damages for personal injuries received by Relator. Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company appealed from a judgment of the Circuit Court of Texas County, Missouri, for $5,691.00.

The defendant was given credit for $600.00 and interest thereon in the sum of $91.00, for money which the Trustee had loaned to the Relator.

On the 14th day of December, 1940, said Court of Appeals, in an opinion rendered, reversed said judgment of the trial court. Thereafter, and within the time allowed by the Springfield Court of Appeals, Relator filed a motion for rehearing, which said motion for rehearing was, by said Court, overruled December 31, 1940. Relator further states that a certified copy of the opinion in said cause is filed herewith, marked Exhibit "A", and made a part of this petition; that true copies of the motion for rehearing and brief in support thereof are filed herewith, marked Exhibit "B", and made a part of this petition; that a true copy of the supplemental opinion of the Springfield Court of Appeals, as rendered on rehearing, is filed herewith, marked Exhibit "C", and made a part of this petition; that a certified copy of said Court of Appeals' opinion denying appellant's motion for rehearing is herewith filed, marked Exhibit "D", and made a part of this petition.

Relator bases this petition for certiorari on the following grounds:

[fol. 217] 1. The Court of Appeals erred in holding in its opinion that Exhibit "D" (set out in Exhibit "B", pp. 1-2, attached hereto) does not come within the provision of Title 45, Section 55, of the Federal Employers' Liability Act; and in further holding that the $600.00 loaned to the relator by the railroad company could not properly be credited upon the verdict and judgment rendered in the trial court. The opinion is in direct conflict with the holding of this Court in Gieseking v. Litchfield & Madison Ry. Co., 344 Mo. 502, 127 S. W. (2d) 700. Six Hundred Dollars was loaned the relator by the railroad. This loan was made "for living and other expenses pending further developments as to the extent and effect of said injuries, and negotiations for settlement of my claim against said trustee for said injuries." It is admitted by the railroad that Exhibit "D" was not a release. The opinion of the Court of Appeals found that it was not a release. The relator filed suit without returning the money borrowed. The opinion of the Springfield Court of Appeals is clearly erroneous in holding that the relator could not prosecute his cause of action without first returning the money bor-

rowed. This holding is erroneous and in direct conflict with the holding in Gieseking, supra, and a mere reading of Exhibit "D" and the opinion rendered by the Court of Appeals will be sufficient for this court to immediately order this writ. The opinion of the Court of Appeals admits that, "if Exhibit "D" is covered by this section of the act, then it is no obstacle to plaintiff's recovery; the agreement is void without regard to fraud in its procurement, and, under the proviso clause to the section, defendant is only entitled to set off the $600.00." (Exhibit "A", page 12). The money borrowed was credited by the jury's verdict (Exhibit "A", p. 10). The opinion then holds that such credit was improper, and, therefore, is erroneous and in conflict with Gieseking, supra, as well as in conflict with the holding in Philadelphia B. & W. R. Co. v. Schubert, 56 L. Ed. 951.

2. The Court of Appeals erred in holding that the partial payment of $600.00 to relator operated as a bar to the prosecution of his suit. This holding is in direct conflict with the holding of this court in Crouch v. Quigley, 258 Mo. 651; 167 S. W. Reporter 978.

[fols. 218-219] Exhibit "D" provides that the $600.00 was made as a partial payment for the injuries sustained by the relator. This fact is undisputable because Exhibit "D" provides that the loan was made "pending further developments as to the extent and effect of said injuries." If this fact alone were not sufficient to establish beyond doubt that the loan was only made in partial payment for injuries sustained, the draft written by the railroad to Barker Duncan removes all possibility of any other interpretation because it states (Exhibit "C", page 3) that the $600.00 was paid on "account of *partial payment in settlement for injuries sustained* on or about April 10, 1936, at Nevada, Missouri." The holding of the Springfield Court of Appeals in its opinion that Exhibit "D" and the draft constitutes a "compromise and settlement," or an "accord and satisfaction" is so clearly erroneous as to need no further comment.

Wherefore, relator prays the Court to take jurisdiction of this cause to issue a Writ of Certiorari directed to the Springfield Court of Appeals and the Judges thereof, requiring them to certify this cause and file herein the entire record in the case of Barker Duncan, Respondent, vs. Guy

A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant, Case No. 6194, to the end that the same may be heard and the opinion and judgment of the said Springfield Court of Appeals be quashed.

Respectfully submitted, John Moberly, Houston, Missouri, F. P. Sizer, Wm. J. B. Myres, Monett, Missouri, by Wm. J. B. Myres, Attorneys for Respondent.

Duly sworn to by Wm. J. B. Myres, jurat omitted in printing.

[fols. 220-240] Exhibit "A" omitted. Printed side page. 155 ante.

* * * * * * *

[fols. 241-252] Exhibit "B" Omitted. Printed side page. 194 ante.

* * * * * * *

[fols. 253-268] Exhibit "C" Omitted. Printed side page. 177 ante.

* * * * * * *

[fol. 269] Exhibit "D" Omitted. Printed side page. 193 ante.

[fol. 270] Suggestions in Support of Petition

The opinion of the Court of Appeals did not set out the instrument marked Exhibit "D" in the original opinion. On motion of the relator, this Exhibit was set out on pages 1 and 2 of the supplemental opinion overruling motion for rehearing. The Court of Appeals said that this instrument had "a unique character." The "uniqueness" of this instrument is to defeat the liability created by the Federal Employers' Liability Act. It is so "unique" in its character that this Court will immediately appreciate that its true intent and purpose is to prevent suits for personal injuries without taking a release. The relator contended in his brief that this instrument was in direct conflict with Section 2964, R. S. Missouri, 1929, because it does limit the time for the bringing of law suits. The Court of Appeals failed to pass

upon this question. The relator further contended that this instrument was unilaterial in character, and lacked mutuality between the parties, and for that reason it was unenforceable. This point also was not ruled on by the Court of Appeals.

1. The opinion holds that the $600.00 loaned to the relator by the railroad company could not be credited on the verdict. Title 45, Section 55, U. S. C. A., provides that, "such common carrier may set off therein any sum it has contributed or paid to any insurance relief benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which such action was brought." Exhibit "D" provides that the money was paid to the relator for his living expense and "*pending further developments as to the extent and effect of said injuries.*" The verdict was credited by the jury with the $600.00, plus interest of $91.00, as shown by Exhibit "A", at page 10.

This Court has held in Geiseking v. Litchfield & Madison Railroad Company, 344 Mo. 502, 127 S. W. (2d) 700, that any amounts due the railroad from the injured employee can properly be credited under the proviso of section 55, U. S. C. A., supra. The amount of $600.00 was a loan made by the railroad to the relator. The relator was not entitled [fol. 271] to keep said sum, and the jury was so instructed. By proper instruction the jury was told to credit the Six Hundred ($600.00) Dollars, and interest thereon, due from the relator. Under the facts set out in this opinion, and its conclusions, it is in direct conflict with this court's holding in Gieseking, supra. Speaking through Commissioner Hyde, this Court held:

"* * * *Whether that is true or not is immaterial because we consider that amounts due from plaintiff to defendant (payments he was not entitled to keep) could properly be so credited (as under the rule stated in section 55) regardless of the applicability of section 55 to this situation.* * * *"* Gieseking v. Litchfield & Madison Ry. Co., 127 S. W. (2d) 700, l. c. 703.

The relator believes that when the court has read the instrument marked Exhibit "D" and the opinion of the Springfield Court of Appeals, the direct conflict and clash of opinions will be apparent.

2. The holding that the loan of $600.00 operated as a bar to the prosecution of the relator's suit until the same was returned, is in direct conflict with the holding of this Court in Crouch v. Quigley, 259 Mo. 651, 167 S. W. Reporter, 978. This Court used the following language:

"*As an accord partially executed will not operate as a bar to a suit on the original claim, it follows that it was unnecessary for the plaintiff to tender back the* $100 *received by her before bringing this suit. If, as pleaded in the answer, this money was accepted as an entire satisfaction, it is a complete bar to the plaintiff's suit. If it was only a part performance of a settlement, involving the payment of more money and the execution of notes to take the place of the original cause of action, it constituted no bar.* * * *" Crouch v. Quigley, 167 S. W. Reporter, 978, l. c. 980.

Was the $600.00 accepted by the relator "*as an entire satisfaction?*" If the relator did accept the $600.00 as an entire satisfaction, the suit is barred by the holding of Crouch, supra, and the opinion of the Springfield Court of Appeals is correct. However, the facts stated in the opinion and the instrument marked Exhibit "D", and the draft for [fol. 272] $600.00 given the relator, remove all doubt that the relator did accept the $600.00 in full satisfaction of his claim. The draft given is set out in the supplemental opinion, written on motion for rehearing, at page 3. It states that the $600.00 was made for "*partial payment in settlement for injuries sustained.*" The instrument marked Exhibit "D" stated that the $600.00 was paid for living expenses, "pending developments as to the extent and effect of the relator's injuries," and further pending "negotiations for settlement of the relator's claim," which, of course, was the balance due over and above the $600.00. No other interpretation could possibly be given these undisputable facts that the $600.00 was made as partial payment on the relator's claim. The holding, therefore, of the Court of Appeals, is in direct conflict with Crouch, supra.

Petitioner respectfully argues that a causal reading of Gieseking and Crouch, supra, will convince this Court that the Springfield Court of Appeals has committed error in its opinion, which is in direct and hopeless conflict with

the opinions of this Court, and the writ of certiorari herein should be issued.

Respectfully submitted, John Moberly, Houston, Missouri. Sizer & Myres, Monett, Missouri. By Wm. J. B. Myres, Attorneys for Relator.

[fol. 273] In Supreme Court of Missouri

State of Missouri, at the Relation of Barker Duncan, Relator,

vs.

David E. Blair, Robert J. Smith and James F. Fulbright, Judges of the Springfield Court of Appeals, Respondents

Order Denying Petition for Writ of Certiorari—Filed February 1, 1941

Certiorari

Now at this day, on consideration of the petition for a writ of certiorari herein to the said respondents, it is ordered by the Court here that the said petition be, and the same is hereby denied.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 274] In Supreme Court of United States

Stipulation as to Printing Record—Filed April 26, 1941

It is hereby stipulated and agreed by and between the Petitioner, Barker Duncan and his attorney, Harry G. Waltner, Jr., of Jefferson City, Missouri, and Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, a Corporation, Appellant and his attorneys McReynolds & Flanigan, of Carthage, Missouri, that:

The photographs, Plaintiff's Exhibits "A" and "B", on page 14, and Plaintiff's Exhibit "C" and Defendant's Exhibit "1", on page 16, in the Abstract of the Record in the case of Barker Duncan v. Guy A. Thompson, Trustee

of Missouri Pacific Railroad Company, a Corporation, No. 6194, filed by the Appellant in the Springfield Court of Appeals, are not material for a review by this Court of the Writ of Certiorari to be filed in this Court; that the Honorable Charles Elmore Cropley, in supervising and printing the record in this cause shall omit therefrom the above photographs.

Harry G. Waltner, Jr., Attorney for Petitioner, Jefferson City, Mo. By McReynolds & Flanigan, Attorneys for Appellant, Carthage, Mo.

[fol. 275] Supreme Court of the United States

Barker Duncan, Petitioner,

vs.

Guy A. Thompson, Trustee of Missouri Pacific Railroad Company

Order Extending Time Within Which to File Petition for Certiorari

Upon consideration of the application of counsel for the Petitioner,

It is ordered that the time within which to file petition for certiorari in the above-entitled cause be, and the same is hereby, extended to, and including May fifth, 1941.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 26th day of April, 1941.

[fol. 276] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the Petitioner,

It Is Ordered that the time within which to file petition for certiorari in the above-entitled cause be, and the same is hereby, extended to, and including, May 12th, 1941.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of May, 1941.

[fol. 277] SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1941

No. 78

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Springfield Court of Appeals of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.